

*Climate Change, Human Displacement, International
Law and Justice*

Fanny Thornton

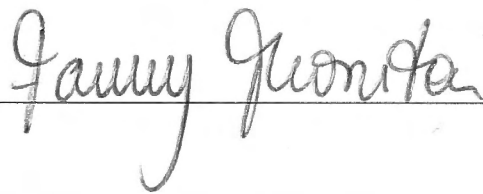
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A thesis submitted for the degree of Doctor of Philosophy of the
Australian National University

DECLARATION

I, *Fanny Thornton*, declare that this thesis, submitted for the degree of Doctor of Philosophy, is the result of my own work and that where reference is made to the work of others, due acknowledgement is given.

This thesis has not been submitted to any other university or institution.

A handwritten signature in cursive script, reading "Fanny Thornton", is positioned above a horizontal line.

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July 2014

ABSTRACT

The thesis investigates how a justice framework is relevant to analysis of the role of international law in relation to climate change-compelled human displacement. In particular, through the application of a justice framework, questions of responsibility will be explored. It will be argued that such a lens provides unique insights concerning conceptualisations of the role international law may play, or should play, in relation to the phenomenon. Specific justice theories selected are corrective and distributive justice, which will be explored in a substantial theoretical chapter forming the analytical backbone of the thesis. The theories then inform the more contextualised analysis about the role of international law in relation to climate change and human displacement. Corrective justice permits analysis of whether climate change-compelled displacement, including the livelihood impacts that may precede it, could be conceived as damage or harm which is compensable under international law, either through fault-centred regimes or no-fault regimes (i.e. insurance). Distributive justice permits analysis of whether climate change-compelled displacement could potentially be framed as an undeserved and disproportionate burden which stipulates international action to rebalance it, through distributing either costs or burdens. The thesis hopes to contribute to the growing scholarship concerning international law, climate change and human displacement by investigating the bounds of the law where the phenomenon is viewed as one of responsibility and of justice.

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***This thesis is accurate to 2013.

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ABBREVIATIONS

ACP	African, Caribbean and Pacific Countries
AF	Adaptation Fund
AOSIS	Alliance of Small Island States
ASEAN	Association of Southeast Asian Nations
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
AU	African Union
AWG-LCA	Ad Hoc Working Group on Long-Term Cooperative Action
CCFM	Climate Change Funding Mechanism
CCRIF	Caribbean Catastrophe Risk Insurance Facility
CEAS	Common European Asylum System
CESCR	Committee on Economic, Social and Cultural Rights
CDF	Clean Development Fund
CDM	Clean Development Mechanism
COP	Conference of the Parties
CO2	Carbon Dioxide
CPA	Comprehensive Plan of Action
EC	European Communities
ESCR	Economic, Social and Cultural Rights
EU	European Union
EXCOM	Executive Committee
GCCA	Global Climate Change Alliance
GCF	Green Climate Fund
GDP	Gross Domestic Product
GEF	Global Environment Facility

GNP	Gross National Product
GTZ	Gesellschaft für Technische Zusammenarbeit
G-77	Group of 77
HARITA	Horn of Africa Risk Transfer for Adaptation
IASC	Inter-Agency Standing Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
ILC	International Law Commission
ILO	International Labour Organization
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
IRO	International Refugee Organization
LDC	Least Developed Country
LDCF	Least Developed Countries Fund
MDG	Millennium Development Goal
NAIL	New Approaches to International Law
NAPA	National Adaptation Programme of Action
NASA	National Aeronautics and Space Administration
NIEO	New International Economic Order
OAS	Organization of American States
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
ODA	Overseas Development Aid
OECD	Organisation for Economic Co-operation and Development

NGO	Non-Governmental Organisation
PPM	Parts Per Million
REDD+	Reducing Emissions from Deforestation and Forest Degradation Plus
SCCF	Special Climate Change Fund
SIDS	Small Island Developing State
SPA	Strategic Priority on Adaptation
TEIA	Transboundary Environmental Impact Assessment
TPS	Temporary Protected Status
TWAIL	Third World Approaches to International Law
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCS	United Nations Compensation Scheme
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	Office of the United Nations High Commissioner for Refugees
UNU-EHS	United Nations, Institute for Environment and Human Security
US	United States of America
USD	US Dollar(s)
WTO	World Trade Organisation

CASES AND INSTRUMENTS

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Charter of the United Nations and Statute of the International Court of Justice (signed 26 June 1945 (entered into force 24 October 1945)).

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Convention Governing the Specific Aspects of Refugee Problems in Africa, signed 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974).

Convention on Environmental Impact Assessment in a Transboundary Context, adopted 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997).

Convention on Reduction of Statelessness, signed 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

Convention on the Elimination of all Forms of Discrimination against Women, signed 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

Convention on the Rights of the Child, signed 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

Convention Relating to the Status of Stateless Persons, signed 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

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Trusteeship Agreement for the Former Japanese Mandated Islands, signed 6 July 1947, 8 UNTS 189.

United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

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CHAPTER 1

Thesis Introduction

Justice? – You get justice in the next world. In this one you have the law.
(William Gaddis, 1994)¹

1. Climate Change, Displacement, International Law and Justice

The possibility that anthropogenic (man-made) climate change and its effects could impact, compel or induce human displacement has been the subject of much reporting and debate for some time. Prevalent have been images of ‘drowning islands’ creating ‘castaways’ in dramatic fashion,² joined, at times, by concerns that millions of ‘climate (change) refugees’ would result from the effects of climate change.³ Academic scholarship concerning human displacement which may arise from environmental change generally, and the impacts of climate change in particular, has turned to urging caution against the often overly simplistic and sensationalist depictions entailed in such portrayals.⁴ Rather, scholarship has turned to infusing debates about the possibility of such human movement with greater nuance. Major contributions have been made towards uncovering the many possible expressions of movement (or even a lack thereof) arising from (or in relation to) climate change impacts, its complex and often inter-acting causes and possible ways

¹ William Gaddis, *A Frolic of His Own* (Scribner, 1994) 13.

² See, eg, Ben Doherty, ‘Climate Change Castaways Consider Move to Australia’, *Sydney Morning Herald* (online), 7 January 2012 <<http://www.smh.com.au/environment/climate-change/climate-change-castaways-consider-move-to-australia-20120106-1pobf.html>>. Further examples are cited throughout the thesis.

³ See, eg, John Vidal, ‘Global Warning Could Create 150 Million “Climate Refugees” by 2050’, *The Guardian* (online), 3 November 2009 <<http://www.guardian.co.uk/environment/2009/nov/03/global-warming-climate-refugees>>. Scholars, too, have stipulated the possibility of mass displacement in the climate change context, which will be critically explored in greater detail in the next chapter.

⁴ See, eg, Carol Farbotko, ‘Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation’ (2010) 51 *Asia Pacific Viewpoint* 47; more also in ch 2 of this thesis.

to address it.⁵ The discipline of international law has been important in this effort. It has contributed in significant ways to moving the discourse concerning the phenomenon away from its overly sensationalist and simplistic origins, bound to the idea of the so-called ‘climate refugee’, to a more nuanced perspective.⁶ Great strides have been made in taking the discipline beyond its early discovery that international refugee law will have a negligible part to play, at best, where human movement is compelled by, or linked to, anthropogenic climate change’s effects. Instead, the discipline has explored the relevance of a host of other international law branches and sub-branches and has uncovered an array of potential obligations held by states (and other actors) in relation to such movement.⁷

This thesis seeks to infuse the relationship between climate change, human movement and international law with a further dimension – justice. The fact that anthropogenic climate change in general raises a host of justice issues is now widely acknowledged.⁸ People movement arising from (or in relation to) climate change impacts is also recognised to raise justice or equity concerns,⁹ in particular, where it is not desired and involuntary, movement perhaps best described as displacement, a term which will be employed widely throughout the thesis.¹⁰ Similarly, geo-spatial inequities in the distribution of both displacees and migrants (often considered those moving more voluntarily) in the climate change context have been conceded, with

⁵ For an overview of a lot of the most important scholarship, see International Organization for Migration, ‘People on the Move in a Changing Climate: A Bibliography’ (2012). And consult ch 2 of this thesis and the bibliography.

⁶ See, in particular, Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012). A fuller representation of the relevant scholarship is provided in ch 3 of this thesis.

⁷ These findings are presented in ch 3 of this thesis.

⁸ See, eg, S Gardiner, S Caney, D Jamieson and H Shue, *Climate Ethics: Essential Readings* (Oxford, Oxford University Press, 2010).

⁹ See, eg, Laura Westra, *Environmental Justice and the Rights of Ecological Refugees* (Earthscan, 2009).

¹⁰ Ch 2 will justify the usage of the term ‘displacement’ in this thesis and further clarify definitional issues.

many poorer, developing states and their citizens expected to be burdened more considerably.¹¹ Yet the concept of justice rarely features in an explicit form in the legal scholarship concerning climate change and people movement. This thesis argues that this is a serious limitation.¹²

The thesis contends that the concept of justice enables legal considerations, especially those pertaining to international law, to be imbued with a question significantly underexplored in the scholarship.¹³ As has been noted, international law scholarship concerning people movement in the climate change context has been motivated by a desire to explore the relevance of a host of the law's branches and sub-branches for their relevance in responding to such movement. Some important potential obligations have thus been discovered.¹⁴ However, obligations here are conceptualised as those that arise out of the positive law, which means scholarship has largely been bound by the purposes or opportunities inherent in the law itself. What a justice-centred analysis, importantly, adds to this is consideration of what obligations may exist instead in relation to the question of responsibility – for harm, for damage, or for disproportionate burdens, for example. Is it possible that the relevance and applicability of international law are different if the analysis is bound to questions of justice, and therefore of responsibility? The task of this thesis is to explore this in some detail.

¹¹ Distributional issues have, eg, been considered in Foresight, 'Migration and Global Environmental Change: Final Report (Government Science Office, UK, 2011); more also in ch 7 of this thesis.

¹² Jean-François Durieux notes that a focus on (climate) justice in scholarship concerning climate change, human movement and international law is an under-explored gap; see Jean-François Durieux, 'Book Review: Climate Change, Forced Migration, and International Law' (2013) 25 *International Journal of Refugee Law* 187, 189.

¹³ Although subject to more detailed discussion in ch 4, it may be useful to state from the outset how law may differ from justice. According to the Law Dictionary, law is 'any system of regulations to govern the conduct of the people of a community, society or nation, in response to the need for regularity, consistency and justice based upon collective human experience', whereas justice refers to 'fairness', 'moral rightness' or 'a scheme or system of law in which every person receives his/her/its due from the system, including all rights both natural and legal.' In other words the two are separate but linked; see Law Dictionary (2014) <<http://dictionary.law.com/>>.

¹⁴ Ch 3 of this thesis outlines these in greater detail.

2. Why Justice? What Justice?

This thesis focuses on the concepts of climate change and *displacement*; doing so, it emphasises the idea that people movement arising from the effects of anthropogenic climate change may be involuntary, not desired, imposed, a burden.¹⁵ The thesis will analyse how responsibilities may arise and may be invoked in relation to this. Of course, it is possible to consider the question of responsibility in this context in different ways. The thesis has selected a specific framework to approach this. It contends that justice theory provides a particularly appropriate analytical background by which to approach the question. Justice, at its heart, is essentially concerned with one thing: how, in human interactions and relations, each party is rendered its due. The flip side of this concern is, of course, what ought to happen where one party has not been rendered this; what responsibilities this engenders amongst the parties, especially the one which has failed to render what is due. It is easy to see how an analysis bound only by this question is difficult to reign in, or how such an analysis might become perhaps utopian. Therefore this thesis is bound by two further limitations: First, the thesis utilises only two particular justice constructs – corrective and distributive justice. Aristotle, to whose theory of justice the two are essential, contended that all justice disputes concerning human interactions ultimately fit either of these constructs. Chapter Four will outline this and provide further justification for why these two have been selected. For now, it should suffice to say that corrective justice permits analysis of whether climate change-compelled displacement, or the livelihood and other impacts that precede it and the consequences that follow it, could be conceived as damage, loss or harm that is compensable. Two versions of

¹⁵ Ch 2 of this thesis provides further explanations and justification for this focus and will highlight complexities concerning the usage of the term ‘climate change (and) displacement’.

corrective justice are considered: one 'pure' and fault- or perpetrator-centred, the other 'rough' and less focused on fault and the identification of perpetrators. Distributive justice, on the other hand, permits analysis of whether climate change-compelled or related displacement could potentially be framed as an undeserved and disproportionate burden requiring collective rebalance. The thesis will argue that this is indeed possible. Two models are then considered: one essentially focused on rebalancing through cost-sharing, the other through burden-sharing. Secondly, the analysis in chapters to follow is further bound by justice considerations as they arise in relation to international law. In other words, guided by corrective and distributive justice, the analysis will centre on how international law may be relevant to displacement in the climate change context if viewed from the perspective of the two selected justice paradigms.

3. Argument and Structure

The thesis will proceed with the following overall argumentative structure: it contends that human displacement in the climate change context is a complex phenomenon, which raises intricate questions concerning responsibilities and obligations, and for the application and relevance of international law and of justice theory, especially where the two are to be applied in concert. Nevertheless, although the phenomenon may be complex, multi-causal and multi-dimensional, a contributing factor to its occurrence is, undoubtedly, anthropogenic (man-made) climate change, or rather its effects (which is why the notion of displacement, in the

first place, is the focus of this thesis above others¹⁶). This means that interesting questions of responsibility *are* raised, which have not often been explored in the existing international law scholarship concerning the phenomenon, a gap which this thesis will seek to fill through the application of justice theory, in particular, the application of corrective justice and distributive justice concepts.

Chapter Two is scene-setting and provides the non-legal background to the thesis. It does so by analysing simultaneously the discourse which has emerged surrounding climate change and people movement and the evidence concerning both the anthropogenic nature of climate change and the impact of its effects upon human displacement. It will argue that the former (the discourse) was long damaging to conceptualisations of people movement in the climate change context, with potentially detrimental consequences for persons and communities likely to be affected, and, arguably, with consequences for the extent to which a justice-inspired framework appears relevant. In exploring the evidence, the chapter will briefly present the no-longer controversial argument that current climate change is anthropogenic in nature but also highlight that the effects of climate change alone will not compel displacement (or even inevitably compel it). Rather, the chapter will show that, where movement occurs, it may well be the result of a number of interacting factors of which the effects of climate change may only be one. The implications that this may have for a justice-inspired analysis of the phenomenon will be highlighted but the chapter will conclude that the relationship between anthropogenic climate change and the possibility of displacement is nevertheless not insignificant, which does raise important questions about responsibility best explored

¹⁶ See ch 2 of this thesis.

through application of a justice-inspired analytical framework, including in relation to international law.

Chapter Three is contextual and it will present the treatment of climate change and human displacement in the international law scholarship. The discipline has undoubtedly played its part in raising awareness about the phenomenon and has made great strides in exploring and uncovering the relevance of many of international law's areas of speciality to addressing displacement in the climate change context. However, the chapter will also draw attention to a limitation which is notable in the disciplinary treatment – that it has focused largely on the positive law's inherent opportunities and purposes, and less so upon other important principles, which include justice. This has further meant that the discipline is focused on how the law may be relevant in *responding* to displacement in the climate change context, how to deal with its consequences. Some obligations arising from the positive law have thus been uncovered. However, this thesis will seek to explore the questions of obligations from a different angle, notably that of responsibility.

Chapter Four is also contextual and presents the theoretical framework to be employed in later chapters. It has already been noted that the analytical framework or lens this thesis will utilise is justice theory, through which questions of responsibility between interacting parties are commonly explored. In particular, the chapter will seek to justify why the specific angles of corrective and distributive justice have been selected. Substantial sections of the chapter will explore the nature and scope of each and will also seek to evaluate the extent to which questions of 'justice' usually feature in international law scholarship.

Chapter Five will be the first of two chapters which will take one particular justice angle – namely corrective justice – and apply it to questions of responsibility

under international law in relation to climate change and human displacement. The chapter will explore whether a ‘pure’ corrective claim could be established under international law, one where casualties (the bearers of loss or harm), a specific perpetrator (or several) and actually correctable harm, damage or loss are all established. The chapter will conclude that this may be very difficult, not least because of how corrective justice is incorporated or reflected in international law, and because of the complexities highlighted in Chapter Two.

Chapter Six will continue with corrective justice, but in a less ‘pure’ form. The chapter builds on its predecessor in acknowledging that identifying a specific perpetrator (or even several) in particular in the anthropogenic climate change context is complex and difficult but that this cannot mean that those affected detrimentally by its effects have no opportunity to seek redress. It will rely on the logic which has informed the establishment of no-fault compensatory mechanisms – especially those akin to insurance – in exploring alternative, ‘rougher’ mechanisms of compensation and correction. Detailed attention will also be paid to existing support for such mechanisms under international law and for their specific relevance to climate change and human displacement.

Chapter Seven will move the analysis forward to the realm of distributive justice and away from conceptualisations of displacement as compensable harm or damage. Rather, the chapter will construct the climate change and displacement phenomenon as one of unequal distribution, arguing that it may be geo-politically distributed in disproportional ways but also that it presents a burden which is disproportionate given that some have unjustly benefited from processes which have contributed to its occurrence. The chapter will argue that such distributional issues require rectification as a matter of distributive justice. The chapter will also explore the extent to which

international law incorporates distributive justice notions and how it may be achieved under international law in relation to climate change and human displacement. The investigation will focus, in particular, on international environmental law and the emerging international adaptation (finance) architecture, and thus the possibility of distributive justice through cost distribution for those facing displacement or wishing to prevent it.

Chapter Eight will also rely on distributive justice concepts to analyse whether the concept of burden-sharing known to international law and relations, especially in the displacement context, provides an additional means by which to approach distributional issues (those facing states who must shelter or assist displacees) in the climate change and displacement context. The chapter will explore the concept's normative foundations, in particular in relation to justice, and show how these are complex, therefore making this a difficult concept to apply in relation to the phenomenon explored in this thesis. The chapter will nevertheless explore inter-state motivations for sharing, experience with burden-sharing in the displacement context, reflections of the notion of sharing (and the related concepts of cooperation and solidarity) in international law, as well as burden-sharing proposals already put forward in relation to climate change and human displacement, all in an effort to delimit the boundaries of its relevance for the purposes of this thesis.

The Conclusion presented in Chapter Nine, naturally, will collate the major themes and outcomes which have emerged in the preceding chapters. Key insights gained through the application of a justice framework will be identified and situated in the context also of possible limitations of a justice approach. The Conclusion will, finally, highlight gaps that the thesis was unable to address and recommend possible worthwhile avenues for further study.

CHAPTER 2

Climate Change and Displacement: Utility and Complexity

[L]et's be honest: I'd come in search of imminent catastrophe.

(Mark Levine, 2002)¹

[A] shadow that is no less ominous because it is formless and obscure.

(Rachel Carson, 1962)²

1. Introduction

In debates about the environment and human mobility, climate change and its effects are increasingly playing a prominent role. Climate change impacts upon the environment, natural resources and human livelihoods seemingly provide a persuasive case to argue that environmental factors could compel people to move – possibly on a very large scale.³ Sometimes highlighted in the literature to support this point is the Intergovernmental Panel on Climate Change (IPCC), which noted in its first Assessment Report that:

[t]he gravest effects of climate change may be those on human migration, as millions are displaced by shoreline erosion, coastal flooding and severe drought. Many areas to which they flee are likely to have insufficient health and other support services to accommodate the new arrivals. Epidemics may sweep through refugee camps and settlements, spilling into surrounding communities.⁴

Numerous studies, both prior to this statement but particularly since, have sought to clarify the relationship between the environment and various types of human

¹ Mark Levine, 'Tuvalu Toodle-oo', *Outside* (online), 1 December 2002 <<http://www.outsideonline.com/adventure-travel/australia-pacific/Tuvalu-Toodle-oo.html>>.

² Rachel Carson, *Silent Spring* (Houghton Mifflin, first published 1962, 1992 ed) 238.

³ Environmental factors indeed play a role in large-scale human displacement: note, for example, the three million dust bowl 'refugees' of 1930s America. For historic accounts of people movement concerning the Pacific Islands (including in relation to environmental stressors), now thought to be particularly threatened by climate change, see Michael D Lieber, *Exiles and Migrants in Oceania* (The University of Hawaii Press, 1977).

⁴ Intergovernmental Panel on Climate Change, *Climate Change: The IPCC 1990 and 1992 Assessments* (1992), 103, para 5.0.10 <http://www.ipcc.ch/ipccreports/far/IPCC_1990_and_1992_Assessments/English/ipcc-90-92-assessments-fullreport.pdf>.

mobility, particularly so in the context of climate change.⁵ The current chapter will engage with the research and analytical outputs thus generated. Doing so, the chapter has two goals: First, it seeks to analyse *how* the relationship has been characterised, represented and problematized. In doing so, the chapter will show an intense, often politically-motivated polarisation of the ‘issue’⁶ and the consequences of this schism and its constitutive positions. Secondly, the chapter will seek to analyse *what* the relationship is, what is actually known about whether, how and what environmental change drives people movement and whether anthropogenic climate change may contribute to such movement. The intention is to highlight how both the representational and empirical perspectives impact on a justice-inspired analysis of the role of international law in relation to climate change-induced displacement.

2. Quantifying Movement: The Numbers Game

The concept of displacement resulting from climate change came to prominence within debates about the wider concept of environmental migration and displacement. Interest in both has been fed particularly through the evocation of

⁵ The literature is now quite substantial. See, eg, Koko Warner, Charles Ehrhart, Alex de Sherbinin, Susana Adamo and Tricia Chai-Onn, ‘In Search of Shelter: Mapping the Effects of Climate Change on Human Migration and Displacement’ (CARE, 2009); Foresight, ‘Migration and Global Environmental Change: Final Report (Government Science Office, UK, 2011); Koko Warner, Tamer Afifi, Kevin Henry, Tonya Rawe, Christopher Smith and Alex de Sherbinin, ‘Where the Rain Falls: Climate Change, Food and Livelihood Security, and Migration’ (CARE, 2012); Frank Laczko and Christine Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (International Organization for Migration, 2009). Also, International Organization for Migration, ‘People on the Move in a Changing Climate: A Bibliography’ (2012). For a more historical take on conceptualisations of the environment in migration studies see Etienne Piguet, ‘From “Primitive Migration” to “Climate Refugees”: The Curious Fate of the Natural Environment in Migration Studies’ (2013) 103 *Annals of the Association of American Geographers* 148.

⁶ Noted and described widely in the literature; eg, by James Morrissey, ‘Environmental Change and Forced Migration: A State of the Art Review’ (Background Paper, Refugee Studies Centre, Oxford University, 2009) and Olivia Dun and François Gemenne, ‘Defining Environmental Migration: Why it Matters so Much, Why it is Controversial and Some Practical Processes Which May Help Move it Forward’ (2008) 6 *REVUE Asylon(s)* 1.

vivid imagery – provided by the media, academic and various advocacy communities alike – of mass flows of so-called ‘environmental refugees’, for example. An exhibition at the Museum of London in 2010 – *Postcards from the Future* – envisioned a climate change-affected capital city with colossal refugee camps surrounding Buckingham Palace and rice paddies at Parliament Square.⁷ Although the imagery thus created helps to keep interest in anthropogenic climate change and its possible effects acute, questions about the legitimacy and utility of such representations also kept the academic discourse on climate change migration and displacement trapped in prevailing disagreement about the representational or conceptual tools frequently resorted to, which, for a time, relegated more interesting and important questions, including concerning responsibility (the question at the heart of this thesis) or the actual linkages between climate change and people movement,⁸ subject of the analysis in Section Four of this chapter.

Disagreement about portrayals of people movement in the environmental and climate change context is variously described to be existing between ‘maximalists’ and ‘minimalists’,⁹ ‘alarmists’ and ‘sceptics’,¹⁰ ‘proponents’ and ‘critics’.¹¹ It arose notably in relation to depictions of such movement as mass migration or displacement.¹² Astri Suhrke noted the schism in 1991, when she stated that

[w]hile the literature on environmental change and population movement is quite limited, two different and opposing perspectives can be discerned. One – which I call

⁷ See George Marshall, ‘Fantasy Images of Climate Migration Will Fuel Existing Prejudices’, *The Guardian* (online), 27 October 2010 <<http://www.guardian.co.uk/environment/cif-green/2010/oct/27/london-futures-climate-change-exhibition>>.

⁸ See, eg, James Morrissey, ‘Rethinking the “Debate on Environmental Refugees”: From “Maximalists and Minimalists” to “Proponents and Critics”’ (2012) 19 *Journal of Political Ecology* 36.

⁹ Astri Suhrke, *Pressure Points: Environmental Degradation, Migration and Conflict* (American Academy of Arts and Sciences, 1991) 4; also in Astri Suhrke, ‘Environmental Degradation and Population Flows’ (1994) 47 *Journal of International Affairs* 473.

¹⁰ Dun and Gemenne, above n 6.

¹¹ Morrissey, above n 8.

¹² See on this also François Gemenne, ‘Why the Numbers Don’t Add Up: A Review of Estimates and Predictions of People Displaced by Environmental Changes’ (2011) 21S *Global Environmental Change* 41.

the minimalist view – sees environmental change as a contextual variable that can contribute to migration, but warns that we lack sufficient knowledge about the process to draw firm conclusions. The other perspective sets out a maximalist view, arguing that environmental degradation has already displaced millions of people, and more displacement is on the way.¹³

The aforementioned IPCC Assessment Report, warning, as it did, that ‘millions’ would be displaced within some future timeframe, is illustrative of the maximalist position. Increasingly specific and deterministic estimates followed it:

- The best-known, and most often-cited, estimates on climate change displacement specifically have been provided by Oxford University-affiliated academic Norman Myers, who has generated flow estimations frequently.¹⁴ Forecasting to 2050, he has stipulated that ‘[w]hen global warming takes hold, there could be as many as 200 million people [displaced] by disruptions of monsoon systems and other rainfall regimes, by droughts of unprecedented severity and duration, and by sea-level rise and coastal flooding.’¹⁵
- Further back, the 1994 Almeria Statement postulated that severe desertification might eventually lead to 135 million displacees.¹⁶
- Robert Nicholls of the Flood Hazard Research Centre at Middlesex University suggested in 2004 that by 2080 up to 200 million people would be displaced by the effects of climate change.¹⁷
- In 2005, the United Nations University’s Institute for Environment and Human Security (UNU-EHS) warned of 50 million ‘environmental refugees’ as early 2010,¹⁸ largely a result of climate change.

¹³ Suhrke, *Pressure Points*, above n 9, 4.

¹⁴ In an oft-cited article from 1993, Myers’ earliest estimate included 150 million displaced persons as a result of global warming; see Norman Myers, ‘Environmental Refugees in a Globally Warmed World’ (1993) 43 *Bioscience* 752, 757.

¹⁵ Norman Myers, ‘Environmental Refugees: An Emergent Security Issue’ (Paper Presented at the 13th Economic Forum, Prague, 23-27 May 2005) 1. He is cited as believing that the figure ‘will be closer to 250 million, in a 2007 Christian Aid report; see Rachel Baird, Katy Migiro, Dominic Nutt, Anjali Kwatra, Sarah Wilson, Judith Melby, Andrew Pendleton, Malcolm Rodgers and John Davison, *Human Tide: The Real Migration Crisis* (Christian Aid, 2007) 48.

¹⁶ *Almeria Statement on Desertification and Migration* (Statement following the International Symposium on Desertification and Migrations, Almeria, 8-11 February 1994) 1.

¹⁷ Robert J Nicholls, ‘Coastal Flooding and Wetland Loss in the 21st Century: Changes under the SRES Climate and Socioeconomic Scenarios’ (2004) 14 *Global Environmental Change* 69, 72.

¹⁸ Institute of Environment and Human Security, United Nations University, ‘As Ranks of “Environmental Refugees” Swell Worldwide, Calls Grow for Better Definition, Recognition, Support’ (Statement to Mark the UN Day for Disaster Reduction, 11 October 2005) 1. Although the link to climate change remains disputed, making this figure somewhat more plausible were the 12 million people affected by severe flooding in Pakistan in August of 2010 alone; see Office of the United Nations High Commissioner for Refugees (UNHCR), *Millions of Flood Victims Require Assistance Today* (2010) <http://www.unhcr.org/emergency/pakistanfloods/global_landing.html>.

- The 2006 Stern Review, initiated by the United Kingdom Government, and a Friends of the Earth report from 2007 both predicted 200 million displaced by climate change by 2050.¹⁹

Particularly in the years leading up to the much-anticipated 2009 United Nations Climate Change Conference in Copenhagen, ever more staggering predictions of mass displacement emerged, a process perhaps best described as the ‘numbers game’.²⁰ Most astounding of all, a Christian Aid report in 2007 suggested that almost one billion people could be permanently displaced by environment-related factors by mid-century, including 250 million by climate-induced slow-onset events such as droughts, floods and famines, as well as a further 50 million by rapid-onset natural disasters.²¹

Although those suggesting such figures have, at times, themselves admitted that they are based on little more than ‘heroic extrapolation’,²² admitting to methodological challenges and flaws, it is easy to see the logic behind the ‘numbers game’. Using numerical information to frame phenomena of potentially global importance is common. Sally Engle Merry notes this, and in describing a ‘turn to indicators’ in the global human rights arena, for example, holds that ‘[n]umbers have become the bedrock of systematic knowledge because they seem free of interpretation, as neutral and descriptive.’²³ Packaging the really rather complex climate change and people movement phenomenon into easily digestible numbers

¹⁹ Nicholas Stern, *The Economics of Climate Change: Stern Review* (Cambridge University Press, 2007) 56; Friends of the Earth Australia, *A Citizen’s Guide to Climate Refugees* (2007) 10; henceforth also ‘Stern Review’.

²⁰ A term coined by Oli Brown, ‘The Numbers Game’ (2008) 31 *Forced Migration Review* 8. It has been noted that the ‘numbers game’ is, at least in part, ‘played’ by simply regurgitating estimates; see Foresight, above n 5, 28.

²¹ Rachel Baird et al, above n 15, 5f.

²² See Norman Myers, cited in Brown, above n 20, 8. Gaim Kibreab notes that numbers are no more than ‘educated guesses’; see Gaim Kibreab ‘Climate Change and Human Migration: A Tenuous Relationship’ (2009) 20 *Fordham Environmental Law Review* 357, 400. The IPCC has also come around to the idea that the ‘numbers game’ is about little more than guessing; see Intergovernmental Panel on Climate Change, *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 365.

²³ Sally Engle Merry, ‘Measuring the World: Indicators, Human Rights, and Global Governance’ (2011) 52 *Current Anthropology* 83, 89.

therefore seemed to imbue the issue with objectivity and neutrality, a useful way also to satisfy an appetite, in the media, advocacy and some policy and academic circles, for accessibility and visibility.²⁴

Critics have been quick to point out at least two major, inter-connected detrimental consequences of the 'numbers game', questioning particularly its neutrality or objectivity: First, they note that the 'numbers game' rapidly securitised²⁵ the climate change and displacement discourse (and the environmental migration and displacement discourse within which it sits). Thomas Homer-Dixon, for example, warned around the time of the afore-mentioned IPCC Assessment Report that 'waves of environmental' refugees [would] spill across borders with destabilizing effects on the recipient's domestic order and on international stability'.²⁶ The military establishment in some Western countries eventually took note. A grim, climate-affected future of wars, conflict, instability and mass migration was portrayed in a 2003 United States (US) Department of Defence report.²⁷ Taking this one step further, a later report by retired US military brass sought to argue that 'climate change will provide the conditions that will extend the war on terror' and that '[m]ore poverty, more forced migrations, higher unemployment[;] those conditions are ripe for extremists and terrorists'.²⁸ Exaggeration and embellishment are acknowledged to be an integral and strategic part of such constructions:

Rather than predicting how climate change will happen, our intent is to dramatize the impact climate change could have on society... [O]ur aim is to further the *strategic*

²⁴ See also Gemenne, above n 12, 45.

²⁵ Securitisation is a term commonly used within realist and constructivist approaches to international relations and refers to the process by which a public issue is constructed as a security concern or threat. The concept is credited to Ole Waever and Barry Buzan; see, eg, Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers, 1998).

²⁶ Thomas F Homer Dixon, 'On the Threshold: Environmental Changes as Causes of Acute conflict' (1991) 16 *International Security* 76.

²⁷ Peter Schwartz and Doug Randall, 'An Abrupt Climate Change Scenario and its Implications for United States National Security' (Report, Global Business Network, 2003).

²⁸ Admiral T Joseph Lopez, quoted in CNA Corporation, *National Security and the Threat of Climate Change* (2007), 17 <<http://securityandclimate.cna.org/report>>.

conversation rather than to accurately forecast what is likely to happen with a high degree of certainty.²⁹

On the other hand, how uncertain the ‘numbers game’ really is was evidenced by UNEP’s (United Nations Environment Programme) removal of its prediction of 50 million displaced by climate change by 2010 from one of its websites, when this scenario had not occurred by the end of that year.³⁰ The UN found itself accused of dishonesty in the blogosphere and other media³¹ and climate change sceptics were delighted that doubt had been sown in a climate change-related matter.³² More importantly, however, significant criticism has come from those who are concerned that securitisation and crisis-talk opens the possibility that victims are turned into perpetrators and that, at worst, the use of force comes to be seen as a legitimate response to displacement.³³

A second avenue of criticism has come from those concerned about the thinly-veiled political motivations or aspirations underpinning the ‘numbers game’. Richard Black, for example, has asked ‘in whose interest it is that environment degradation should be seen as a possible cause of mass displacement?’³⁴ He notes that the notion has its origins with environmentalists more eager to raise attention about issues of

²⁹ Schwartz and Randall, above n 27, 7 [italics added by thesis author].

³⁰ The website now states the following: ‘GRID-Arendal offered a map for everybody to download and further use on Environmentally Induced Migration (“Fifty million climate refugees by 2010”) at this web address. This graphic was originally produced for the Environmental Atlas of the newspaper *Le Monde diplomatique*. We have decided to withdraw the product and accompanying text. It follows some media reports suggesting the findings presented were those of UNEP and the UN which they are not. We hope this clarifies the situation.’ See UNEP/GRID-Arendal, *Environmentally Induced Migration Map – Clarification* (2011) <<http://www.grida.no/general/4700.aspx>>. It may be worth noting, however, that in 2010, over 42 million people were displaced by natural disasters (this includes those displaced by geophysical events), a significant rise from the ca. 17 million just the year before; see Foresight, above n 5, 9.

³¹ See, eg, Axel Bojanowski, ‘UN Embarrassed by Forecast on Climate Refugees’, *Der Spiegel* (online), 18 April 2011 <<http://www.spiegel.de/international/world/0,1518,757713,00.html>>.

³² See, eg Fred Pearce, ‘Search for the Climate Refugees’ (2011) 2810 *New Scientist* 6. For the climate change denial campaign, see more generally James Hoggan, *Climate Cover-Up: The Crusade to Deny Global Warming* (Greystone Books, 2009); see also Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 29, who cites this example.

³³ See, eg, Betsy Hartman, ‘Rethinking Climate Refugees and Climate Conflict: Rhetoric, Reality and the Politics of Policy Discourse’ (2010) 22 *Journal of International Development* 233; Lorraine Elliott, ‘Climate Migration and Climate Migrants: What Threats, Whose Security?’ in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) 175.

³⁴ Richard Black, *Refugees, Environment and Development* (Addison Wesley Longman, 1998) 1.

environmental degradation and the ill-effects of climate change than other matters.³⁵

The consequence, however, would be a turn against migrants, particularly refugees, who already suffered from significant public ill will directed against them in the post-Cold War era.³⁶ As the London-based Information Centre about Asylum and Refugees has highlighted, for example: 'The aquatic imagery of floods and tidal waves [often evoked] is reminiscent of bygone headlines in sections of the United Kingdom's press warning of floods of asylum seekers or a tidal wave of Poles.'³⁷

Such imagery is then easily used to justify policies that deter migrant and asylum seeker arrivals.³⁸ Bhupinder Chimni, though not writing from a climate change perspective, provides a compelling reason why: he articulates a concept he calls the 'myth of difference', a post-Cold War tendency, largely emanating from the Global North, which emphasises that the world's persecuted and oppressed are increasingly moving 'for no good reason', whilst 'abusing hospitality' and, importantly in the context of this section, in 'numbers too large'.³⁹ The myth is then relied upon to justify the imposition of restrictive entry practices concerning displaced persons and other migrants, particularly by Western governments (a 'policy of containment'). The fact that the myth is factually wrong in light of historical migration flows seems irrelevant.⁴⁰ Ultimately, in the environmental displacement context, the 'numbers game' has raised concern about whether it is worthwhile, and just, to dramatize an

³⁵ Ibid.

³⁶ See, eg, Morrissey, above n 8, 42f.

³⁷ Information Centre About Asylum and Refugees, *Climate Change Refugees?* (15 May 2007) <www.icar.org.uk/?lid=8733>. Such imagery is prevalent also in other countries; see, eg, Catriona Ross, 'Prolonged Symptoms of Cultural Anxiety: The Persistence of Narratives of Asian Invasion within Multicultural Australia' (2006) 5 *Journal of the Association for the Study of Australian Literature* 86.

³⁸ See, eg, Gaim Kibreab, 'Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate' (1997) 21(1) *Disasters* 20.

³⁹ B S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 *Journal of Refugee Studies* 350, 357 and 355ff more generally.

⁴⁰ Ibid, 358.

issue in order to bring about action (environmental) but thereby to sacrifice another cause (asylum and immigration advocacy).⁴¹ That this should be dubious is clear.

3. Naming and Conceptualising Movement: The Labelling Game

The ‘numbers game’ has not been the only conceptualisation that has caused disagreement and uncertainty. A ‘labelling game’ has been equally contentious. Particularly antagonistic have been positions which have crystallised concerning the so-called ‘environmental refugee’ or ‘climate (change) refugee’. The concept rose to prominence following a 1985 United Nations Environment Programme paper by Essam El-Hinnawi,⁴² who defined the ‘environmental refugee’ and is generally credited with bringing the concept to the attention of research, policy and activist communities.⁴³ It did not take long for the term to be conceptually tied also to the possibility of displacement originating in climate change and its effects.⁴⁴ Neo-Malthusian in nature, those advancing the ‘environmental refugee’ concept (maximalists again) usually suggest that such persons are the unfortunate but inevitable victims of environmental crises, including those arising in connection with climate change.⁴⁵

Disagreement soon emerged⁴⁶ – concerning once again the politics underpinning the construct, as well as the methodological and conceptual underpinnings of its

⁴¹ Mark Dowie asks similar questions on a larger scale; in Mark Dowie, *Conservation Refugees: The Hundred-Year Conflict Between Global Conservation and Native Peoples* (MIT Press, 2009).

⁴² Essam El-Hinnawi, ‘Environmental Refugees’ (United Nations Environment Programme, 1985).

⁴³ See Morrissey, above n 6, 4.

⁴⁴ Jodi L Jacobson, ‘Environmental Refugees: A Yardstick of Habitability’ (World Watch Institute, 1988).

⁴⁵ See, eg, Morrissey, above n 6, eg, 4 and throughout.

⁴⁶ See, in particular, Stephen Castles, ‘Environmental Change and Forced Migration: Making Sense of the Debate’ (New Issues in Refugee Research Working Paper No 70, Office of the United Nations High Commissioner for Refugees, 2002); Richard Black, ‘Environmental Refugees: Myth or Reality’

constitutive parts. The political schism follows closely that of the 'numbers game'. On the one hand, again, are environmentalists willing to use the image of the hapless refugee, arriving en masse, to push for environmental action.⁴⁷ The 'environmental refugee' is here used as both outcome and source of a problem, the logic being that only if environmental problems (such as climate change) are 'fixed' would there not be a 'refugee problem' with all its alleged attendant security and instability implications.⁴⁸ On the other hand, there are those who warn that such conceptualisations will only further harm asylum or immigration causes. One side seeks to portray displacement as intrinsically 'bad', thereby stimulating action to prevent it, the other seeks to portray this argument itself as 'bad'.⁴⁹ Both end up more concerned with the protection of their respective interests rather than with those who may be affected by environmental change.⁵⁰

Those concerned about the 'refugee' component of the label have further pointed out that a refugee is, legally speaking, someone displaced across borders by persecution in relation to at least one of five specified grounds. Environmental factors contributing to movement would likely not meet the persecution requirement (in relation to at least one of the stipulated grounds) and such movement would also be much more likely to be internal.⁵¹ Eventually, conceptualisations of environmentally-induced movement arose in relation to a profusion of alternative designations, proposed by jurists, activists, academics and international organisations

(New Issues in Refugee Research Working Paper No 34, Office of the United Nations High Commissioner for Refugees, 2001); Kibreab, above n 38.

⁴⁷ See, eg, Carol Farbotko, 'Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation' (2010) 51 *Asia Pacific Viewpoint* 47.

⁴⁸ See Morrissey, above n 8, 41.

⁴⁹ See, eg, Stephen Castles, 'Afterword: What Now? Climate Induced Displacement After Copenhagen' in McAdam, above n 33, 239, 242.

⁵⁰ Morrissey, above n 8.

⁵¹ See, amongst many others, Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) ch 2. Ch 3 of this thesis will dissect this further.

alike.⁵² The ‘environmental refugee’ or ‘climate (change) refugee’ was thereby soon joined by the ‘environmental migrant’, ‘climate exile’ and the ‘eco migrant’. The ‘migrant’ label, in particular, has many proponents. For example, the International Organization for Migration (IOM) has argued that those compelled to move in response to climatic and other environmental changes are ‘environmental migrants’, or

persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual home, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad.⁵³

This does manage to incorporate a variety of important factors: time, space, choice and multiple drivers. However, it leaves other matters ill-addressed. As Anthony Oliver-Smith has pointed out, such conceptualisations usually tend ‘to suggest that nature is at fault, when in fact humans are deeply implicated in the environmental changes that make life impossible in certain circumstances.’⁵⁴ They suggest that there is no ‘persecutor’, no human ‘victimiser’, with the environment the entity responsible for dislocation – and therefore no one in particular for preventing, resolving or responding to it. In its own way, this depoliticises the issue to the same degree that the aforementioned schism over-politicised it.

Also not explicitly noting human contributions to environmental push factors has been another line of conceptualisation – one which seeks to categorise those moving in relation to environmental factors (including those anticipated to arise with climate change) along various continuums. Suhrke,⁵⁵ for example, has stipulated that

⁵² See Dun and Gemenne, above n 6.

⁵³ International Organization for Migration, *Migration, Climate Change and the Environment: Definitional Issues* <<http://www.iom.int/jahia/Jahia/definitional-issues>>.

⁵⁴ Anthony Oliver-Smith, cited in Stefan Lovgren, *Climate Change Creating Millions of “Eco Refugees”*, *UN Warns, National Geographic News* (online), 18 November 2005 <http://news.nationalgeographic.com/news/2005/11/1118051118disaster_refugee.html>. He refers to the ‘environmental refugee’ construct, but what he says is equally true about the ‘migrant’ construct.

⁵⁵ Astri Suhrke, ‘Environmental Degradation and Population Flows’, above n 9.

‘refugees’ are not ‘generated’ by temporary or circular movement in relation to short-term environmental change. Specifically, those making a rational, voluntary or pre-emptive choice are ‘migrants’ and only those compelled to flee sudden and drastic environmental change that is permanent could, conceivably, be classed as ‘refugees’ and thereby deserving of protection. Similarly, Graeme Hugo,⁵⁶ also writing about the role of environmental change in migration, emphasises choice and has maintained that the ‘refugee’ designation must be contingent upon a lack of choice and an element of force. Along a ‘continuum of choice’, he distinguishes between voluntary and involuntary movement and therefore between ‘migrants’ and ‘refugees’. Diane Bates⁵⁷ later picked up on this idea of a continuum, which for her is tripartite, however: ‘Environmental refugees’ move involuntarily as a result of pronounced environmental change. ‘Environmental migrants’ are seemingly required (but not forced in the absolute sense) to move by environmental change. Finally, simply ‘migrants’ are those moving allegedly purely voluntarily (no environmental change compels movement). More recent studies include even more categories along the continuum from voluntary to forced; others envision conceptualisation in relation to other criteria altogether.⁵⁸

The simplicity of some earlier conceptualisations is avoided here. However, if one is to assume that only ‘refugees’ are eligible for protection or assistance, then such obligations may largely arise in relation only to those who face extreme, rapid-onset events (forcing allegedly involuntary movement). What may be ignored is that

⁵⁶ Graeme Hugo, ‘Environmental Concerns and International Migration’ (Centre for Migration Studies of New York, 1996).

⁵⁷ Diane C Bates, ‘Environmental Refugees: Classifying Human Migrations Caused by Environmental Change’ (2002) 23 *Population and Environment* 465.

⁵⁸ See, eg, Cord Jakobeit and Chris Methmann, ‘Klimaflüchtlinge’ [Climate Refugees] (Greenpeace, 2007) 11, who include five steps on the voluntary-involuntary continuum. Others conceptualise differently; for example, distinguishing between slow- and rapid onset-events and their displacement consequences; see, eg, Koko Warner, ‘Climate Change and Migration: Assessing Institutional and Governance Needs Related to Environmental Change and Human Migration’ (German Marshall Fund of the United States, 2010).

those subject to slow-onset change (who may look to be moving ‘voluntarily’) may also have needs that will have to be met, in particular because they may ultimately not be able to return due to the permanent degradation of former living spaces.⁵⁹ Koko Warner has argued that whereby institutional and legal frameworks for displacement related to rapid-onset events are at least partially adequate, with some mechanisms for humanitarian and post-disaster assistance long in place, this is not so much the case for migration induced by slow-onset change.⁶⁰ Additionally, although working with continuums, most conceptualisations just introduced work with the assumption that it is somehow possible to distinguish a voluntary from an involuntary decision to move, which may frequently not be the case. Ultimately, the distinction between voluntary and involuntary movement set up is underpinned by normative or factual considerations which may not always correspond to complex causes, interactions, motivations or needs which exist on the ground.

Furthermore, the continuums all work with the refugee notion. Although refugees are indeed persons who are *forced* to flee (they do not move voluntarily), legally they are recognised as such only in relation to flight for carefully delineated reasons.⁶¹ For this reason, foremost, the refugee notion is avoided in this thesis. Rather, the notion of climate change (and) displacement is employed. This acknowledges a) that the thesis concerns not any environmental change but that impacted by anthropogenic climate change; b) that because of the now widely-

⁵⁹ Note that return following a pronounced natural disaster is, alternatively, often possible; see Asmita Naik, Elca Stigter and Frank Laczko, ‘Migration, Development and Natural Disasters: Insights from the Indian Ocean Tsunami’ (International Organization for Migration, 2007).

⁶⁰ Koko Warner argues: ‘Few regions of the world currently appear equipped to manage human mobility related to slow-onset environmental degradation – some of which may be caused by climate change. The [...] gaps related to this subset of environmentally induced migration come in part because of policy silos, because of the gradual nature of change itself and because of the challenges of sustaining traditional livelihoods or creating alternative livelihoods.’ See Warner, above n 58, 5f; see also the following thesis chapter.

⁶¹ Ch 3 of this thesis will deal in greater detail with this and other legal issues.

accepted anthropogenic nature of current climate change,⁶² it is not simply ‘nature’ which impacts upon movement but ‘nature’ as altered through human activity; and c) that the refugee label is indefensible in light of legal and other constraints and that the migrant label is indefensible in light of factors that may compel movement. Ultimately, it is only a construct such as ‘climate change *displacement*’ which allows for an investigation of questions of responsibility so integral to the justice-based enquiry to follow in later chapters, as ‘displacement’ indicates force (even if it is only indirect), or movement not desired (a burden or a harm), and ‘climate change’ the anthropogenic contribution to that force.⁶³

Returning to the popular ‘environmental refugee’ or ‘climate (change) refugee’ construct briefly, it faced its perhaps most significant challenge from critics concerned about the ‘environmental’ component of the construct, who doubted that it was possible to isolate particular or singular (environmental) causes of displacement or migration, especially in areas where many factors interact with the environment, for example, poverty and under-development.⁶⁴ Such critics therefore grounded their challenge methodologically, arguing that the relationship between environmental change or degradation and people movement is less mono-causal than maximalists usually insinuated.⁶⁵ Suhrke, for example, argued that environmental degradation is

⁶² The following section of this chapter will deal in greater detail with the anthropogenic (man-made) nature of current climate change.

⁶³ Two further qualifications are necessary. As this thesis will soon argue, the effects of anthropogenic climate change do not impact on people movement in isolation of other factors – social, cultural, economic, etc. Therefore, ‘climate change-related displacement’ may be more appropriate, indicating the possibility of interaction with other factors. For brevity’s sake, however, the ‘climate change displacement’ or ‘climate change and displacement’ notion will frequently be used for the cited reasons, but interactional dimensions highlighted as necessary. Secondly, although the thesis concerns climate change ‘displacement’ other terms may, at times, be resorted to (and already have been); for example, migration, movement, mobility. These are used simply in a sense that they are meta-labels that have the potential to cover a wide variety of different human ‘movements’, including displacement. So displacement, for example, creates forced *migrants*, displacement leads to *movement*, etc. Other terms incorporated in the thesis may include resettlement or relocation, as these may precede or follow displacement and are therefore intimately connected to it.

⁶⁴ See, eg, Black, above n 46.

⁶⁵ See, eg, Dun and Gemenne, above n 6.

at best only ever a 'proximate cause of population displacement'.⁶⁶ For some, the idea that it is possible to isolate environmental factor from others in driving migration and displacement was so problematic that the whole idea of environmentally-motivated people movement was deemed nearly preposterous.⁶⁷

However, maximalists have never entirely denied complexity, or proposed mono-causality.⁶⁸ As James Morrissey points out, Norman Myers, for example, often considered the maximalist flag bearer, acknowledged socio-economic circumstance when arguing in 1992 that poorer countries, in particular, may find that 'costs of [adaptation] measures are likely to prove too high for many' – conceding that human adaptability may be the issue in relation to displacement and not simply climatic impacts.⁶⁹ Given that there may, therefore, be at least some fundamental agreement, Morrissey argues that it is now time to 'bury the hatchet' in relation to debates *about* environmental change and human mobility (numbers, labels, conceptualisations, etc.) and to allow a more important and contextualised focus on *how*, in interaction with other factors, environmental aspects impact on people movement, a possibility not entirely denied by even the most ardent critics.⁷⁰ The following section will seek to do just that: rely on the growing evidence base to tease out how certain environmental stresses or impacts, especially those linked to climatic change, may compel, at least in contributory fashion, people movement. Because the analysis in chapters to follow of course also depends on the existence of a link between climatic change and human activity (in particular, the human emission of greenhouse gases), this link will also be established.

⁶⁶ Suhrke, 'Pressure Points', above n 9, 5; Black makes the same point, above n 46.

⁶⁷ Morrissey, above n 8, 38; he cites, Steve Lonergan, 'The Role of Environmental Degradation in Population Displacement' (1998) 4 *Environmental Change and Security Project Report* 5 as an example.

⁶⁸ Morrissey, above n 8, 39f.

⁶⁹ Myers, above n 14, 753; in Morrissey, above n 8, 40.

⁷⁰ See Morrissey, above n 8, esp 45f.

4. Qualifying Movement: What Do We Actually Know?

Analysis in chapters to follow will essentially revolve around two causal chains: First, that certain human activities cause climate change, a notion now quite widely accepted and supported, and with it its associated consequences. Secondly, that some of the effects of anthropogenic climate change impact upon humans in such a way that they compel (or contribute to) displacement, a notion, as will be shown, not so straightforward, mono-causal or mono-directional.

The Anthropogenic Nature of Climate Change and Its Effects

The human contributions to the phenomenon described as anthropogenic climate change are now widely accepted and this thesis will therefore not devote considerable attention to providing evidence of this link. Simply put, although greenhouse gases naturally occur in the earth's atmosphere (or end up there through processes that do not involve human intervention), and are indeed necessary to make our planet suitable for human habitation, the likelihood that their relatively recent measurable increase in the atmosphere is the result of relatively recent increases in human-induced greenhouse gas emissions (foremost carbon dioxide), particularly through the combustion of fossil fuels, is greater than 90 percent.⁷¹ Whilst the 'natural range' for atmospheric greenhouse gas concentrations is thought to be between 172 to 300 parts per million (ppm), concentration levels have increased by

⁷¹ Commonwealth Scientific and Research Organisation (Australia), *Human Activities are Changing the Climate* <<http://www.csiro.au/en/Outcomes/Climate/Understanding/Humans-Changing-Climate/Atmospheric-greenhouse-gas-exceeds-pre-industrial-levels.aspx>>. Note also a study by a team from the University of Queensland, which, having surveyed the abstracts of nearly 12,000 academic journal articles, found that the scientific consensus that anthropogenic global warming is man-made is 97 percent; see John Cook, Dana Nuccitelli, Sarah A Green, Mark Richardson, Bärbel Winkler, Rob Painting, Robert Way, Peter Jacobs and Andrew Skuce, 'Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature' (2013) 8 *Environmental Research Letters* 1.

almost 40 percent in the last 250 years and are now around the 400ppm,⁷² a level ‘greatly exceeding’ that to have occurred through ‘natural processes’ alone.⁷³ The result has been an increase in global average temperatures, which are known to have risen, for example, by 0.35 degrees Celsius between 1910 and the 1940s but, more markedly, by 0.55 degrees Celsius from the 1970s and the compilation of the IPCC’s latest (at time of writing) Assessment Report.⁷⁴ The IPCC leaves little doubt that ‘[m]ost of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations.’⁷⁵ Such changes to global average temperatures have also led to measurable changes to other indicators, including precipitation amount, intensity, frequency and type;⁷⁶ the occurrence and severity of extreme weather events, such as heat waves, droughts, floods and hurricanes;⁷⁷ and sea levels, known to be rising.⁷⁸ Continuing human-induced emissions of greenhouse gases is expected to further alter or vary how these and other phenomena occur.⁷⁹

That said, the challenge for this thesis, and more generally, is not to support the notion that human greenhouse gas emissions contribute to global warming and all its potential (ill)-effects but to determine also whether a specific event (especially one with displacement consequences) may be attributable to climate change. Evidence supports the notion that single climatic or weather events are the result of multiple

⁷² Commonwealth Scientific and Research Organisation, above n 71.

⁷³ European Environment Agency, *How Do Human Activities Contribute to Climate Change and How Do They Compare with Natural Influences?* <<http://www.eea.europa.eu/themes/climate/faq/how-do-human-activities-contribute-to-climate-change-and-how-do-they-compare-with-natural-influences>>.

⁷⁴ Intergovernmental Panel on Climate Change, *Frequently Asked Questions: From the Report Accepted by Working Group I of the Intergovernmental Panel on Climate Change* (2007), 103 <<http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-faqs.pdf>>.

⁷⁵ Intergovernmental Panel on Climate Change, ‘Summary for Policy Makers’ in *Contributions of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change: The Physical Science Basis* (Cambridge University Press, 2007) 10 [italics by thesis author].

⁷⁶ Intergovernmental Panel on Climate Change, above n 74, 105f.

⁷⁷ Ibid, 107f.

⁷⁸ Ibid, 111f.

⁷⁹ Ibid, 122.

factors working in confluence.⁸⁰ However, the IPCC maintains that existing climate models permit a determination at least of the likelihood of a specific event having been *influenced* by human-induced emissions.⁸¹ It contends that '[t]he value of such a probability-based approach – 'Does human influence change the likelihood of an event?' – is that it can be used to estimate the influence of external factors, such as increases in greenhouse gases, on the frequency of specific types of events'.⁸² This provides at least *some* certainty to support the notion that 'human influences will cause an increase in many types of extreme events'.⁸³ It will permit at least the determination that a certain event would likely not have happened without climate change, and therefore the consequences which arise from that event.

The Links Between Climate Change and Displacement

In addition to establishing the link between the anthropogenic nature of current climate change, and human-induced emissions and certain climate-related events, the chapter needs to establish another link – whether and how such events cause, compel, or at least contribute to, displacement. A growing body of evidence has sought to do just that⁸⁴ and it is beyond the scope or purpose of this thesis to present it all. What is certain are two things: First, that the effects of climate change will interact with other factors (non-climatic, non-environmental, pre-existing environmental, etc.), and it is this interaction which will impact displacement. Secondly, climate change impacts which may influence displacement will be both slow-onset in nature, leading to the disruption or destruction of spaces and livelihoods over time, as well as rapid-onset, leading to swift and drastic

⁸⁰ Ibid, 119.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ See above n 5.

environmental change and reaction to it. Beyond this, there is now an array of research which seeks to establish linkages between climate change impacts and people movement, including displacement: this includes research concerning different potential climate change-induced drivers of migration or displacement - for example, rising sea levels, drought and desertification, natural disaster⁸⁵ - and different geographical or topographical regions which may experience it, such as drylands, low-lying coastal or mountainous area⁸⁶ or different countries or continents who may be affected.⁸⁷ The impact of three drivers on certain regions in particular has garnered a lot of attention: the impact of sea-level rise on low-lying islands and coastal zones, the impact of drought and desertification on drylands, and the impact of severe or extreme weather or climatic events, such as floods and storms, on multiple locations. These will now be considered in turn.

Sea-Level Rise and Low-Lying Islands or Coastal Areas

The impact of climate change upon sea levels is increasingly documented, though the extent of anticipated sea-level rise is hotly debated. Estimates of possible rises range from several millimetres per year through to the end of the century to a total of five metres in the same timeframe.⁸⁸ Sea-level rise is thought to present particular

⁸⁵ See, eg, Morrissey, above n 6.

⁸⁶ See, eg, Foresight, above n 5.

⁸⁷ See, eg, Environmental Change and Forced Migration Scenarios Project, *Synthesis Report* (2009) <http://www.each-for.eu/documents/EACH-FOR_Synthesis_Report_090515.pdf>.

⁸⁸ See, Axel Bojanowski, 'UN Climate Body Struggling to Pinpoint Rising Sea Level', *Der Spiegel* (online), 15 June 2011 <<http://www.spiegel.de/international/world/contradictory-studies-un-climate-body-struggling-to-pinpoint-rising-sea-levels-a-774706.html>>. The author links to a draft paper co-authored by NASA's James Hansen, which argues for the doubtful five metres rise by 2100; see James E Hansen and Makiko Sato, *Paleoclimate Implications for Human-Made Climate Change* (2011), 14 <http://www.columbia.edu/~jeh1/mailings/2011/20110118_MilankovicPaper.pdf>. As far as the author of this thesis has been able to discern, the paper has not been published for peer review. For evidence that substantial sea-level rise is now indeed unavoidable due to oceanic thermal inertia, see T M L Wigley, 'The Climate Change Commitment' (2005) 307 *Science* 1766. What seems certain is that sea levels rose by 1.8 mm per year between the 1960s and the turn of the century but that this has increased to an average of 3.3 mm per year rise since (almost doubling); see Philip Sutton, *Climate Code Red: The Case for Emergency Action* (Scribe, 2008) 33.

challenges to low-lying small-island states, especially those located in the South Pacific and the Indian Ocean.⁸⁹ Furthermore, Roger Zetter has argued that ‘the notion of “forced” migration is plausible [in relation to] sea-level rise’.⁹⁰ Nevertheless, the relationship between sea-level rise and people movement is not mono-causal and sea-level rise may contribute to displacement in several ways: for example, rising sea levels may lead to the salinisation of freshwater resources, reducing access to water suitable for human consumption or agriculture, and inundation may make at least some coastal areas uninhabitable.⁹¹

Early studies on the relationship between sea-level rise and displacement assumed that determining likely coastal areas to be inundated would provide an indication of the quantitative extent of the problem.⁹² Robert Nicholls,⁹³ for example, relied on findings from the Special Report on Emission Scenarios, published by the IPCC in 2000, to highlight how the different economic trajectories contemplated by the IPCC (and therefore different emissions scenarios, therefore-different levels of sea-level rise) may impact upon how sea levels affect populations.

⁸⁹ See, eg, Jon Barnett and W Neil Adger, ‘Climate Dangers and Atoll Countries’ (2003) 61 *Climatic Change* 321, David Corlett, *Stormy Weather: The Challenge of Climate Change and Displacement* (UNSW Press, 2008), who focus on the island nation of Tuvalu, Alexander Gillespie, ‘Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility’ (2003-2004) 22 *UCLA Journal of Environmental Law and Policy* 107, and Nobuo Mimura, Leonard Nurse, Roger McLean, John Agard, Lino Briguglio, Peneshuro Lefale, Rolph Payet and Graham Sern, ‘Small Islands’ in Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 687. But note a 2010 study which caused a bit of a stir by arguing that so-called ‘sinking islands’ were not, in fact, sinking, despite sea-level rise; see Arthur P Webb and Paul S Kench, ‘The Dynamic Response of Reef Islands to Sea-level Rise: Evidence from Multi-decadal Analysis of Island Changes in the Central Pacific’ (2010) 72 *Global and Planetary Change* 234. Although the authors themselves make suggestions why their study does not mean that future climate change and its effects (including sea-level rise) will not impact island nations.

⁹⁰ Roger Zetter, ‘The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People’ in Laczko and Aghazarm, above n 5, 385, 396; also Morrissey, above n 6, 30.

⁹¹ Morrissey, above n 6, 32f; also Foresight, above n 5, 77 and Mimura et al, above n 89, Introduction.

⁹² Morrissey, above n 6, 32.

⁹³ Robert J Nicholls, ‘Case Study on Sea-Level Rise Impacts’ (Organisation for Economic Co-operation and Development, Paris, 2003) and Robert J Nicholls, above n 17.

Countering such analysis, Black⁹⁴ argues that it is one thing to calculate populations ‘at risk’ from sea-level rise and quite another to use this as the basis for predicting flight. Human mobility, in many instances, may simply be one response amongst several to inundation and other impacts from rising seas. The IPCC’s Fourth Assessment Report notes the possibility that, in the face of climate change impacts such as sea-level rise, ‘small islands could focus their efforts on enhancing their resilience and implement appropriate adaptation measures’,⁹⁵ thereby reducing the consequences of such impacts. Equally, several authors have noted the multiple social and other factors that impact upon mobility in relation to possible sea-level inundation.⁹⁶

Nevertheless, although there can be no doubt that enhancing social capital and resilience building have a place in preventing flight, the IPCC also notes the burden this presents for many of those affected. In relation to small island states, for example, it argues that many ‘have already perceived a need to reallocate scarce resources away from economic development and poverty alleviation, and towards the implementation of strategies to adapt to the growing threats posed by global warming’,⁹⁷ further increasing the socio-economic vulnerabilities that undoubtedly also play a part in mobility decisions.⁹⁸

One more dynamic is presented in a 2011 report: although in the relationship between sea-level rise (and the inundation and other physical impacts it leads to) and people movement it is often noted that sea-level rise will contribute to movement

⁹⁴ Black, above n 46, 7f; also Foresight, above n 5, s 3.3.

⁹⁵ Mimura et al, above n 89, 690.

⁹⁶ Eg, Sheila Arenstam Gibbson and Robert J Nicholls, ‘Island Abandonment and Sea-Level Rise: An Historical Analog from the Chesapeake Bay, USA’ (2006) 16 *Global Environmental Change* 40 and Colette Mortreux and Jon Barnett, ‘Climate Change, Migration and Adaptation in Funafuti, Tuvalu’ (2009) 19 *Global Environmental Change* 105.

⁹⁷ Mimura et al, above n 89, 690.

⁹⁸ The IPCC also highlights equity issues when arguing that such a reallocation of resources occurs even though small island states themselves have emitted less than one percent of global greenhouse gases that contribute to climate change in the first place; Ibid.

away from affected or vulnerable areas⁹⁹ (for example, from small islands), what is ignored is the fact that a key ongoing global mobility pattern is rural-to-urban migration, especially *towards* coastal mega cities, driven by many environmental and economic push and pull factors influenced also by environmental change.¹⁰⁰ This means that people may well move towards more vulnerable and hazardous areas (prone to inundation and flooding, etc.), rather than escaping them, with some unable to leave once there due to poverty and deprivation.¹⁰¹ This indicates a pernicious dynamic: climate change may contribute to making rural livelihoods more precarious. This contributes to rural-to-urban migration, which contributes to the possibility of habitation in even more vulnerable settings, which some will seek to escape and others cannot.

Drought or Desertification and Drylands

Poor or unpredictable precipitation levels have long been a notable issue for the world's drylands.¹⁰² In the East African context, Oxfam has recognised 'that broader climate change mean[s] wet seasons were becoming shorter. Droughts have increased from once a decade to every two or three years.'¹⁰³ Modelling supports the notion that there will be 'net decreases in moisture' (i.e. precipitation) and increases in drought in the coming decades, particularly in parts of Africa.¹⁰⁴ At the same time, a study linking precipitation and human mobility showed that 'migration decisions are clearly affected by changing rainfall variability and the vulnerability of

⁹⁹ A dynamic the report does not deny; see Foresight, above n 5, s 3.3.

¹⁰⁰ Ibid.

¹⁰¹ Ibid, 84f.

¹⁰² Stefanie M Hermann and Charles F Hutchinson, 'The Scientific Basis: Links Between Land Degradation, Drought and Desertification' in Pierre Marc Johnson, Karel Mayrand and Marc Paquin (eds), *Governing Global Desertification* (Ashgate, 2006) 11.

¹⁰³ Paul Smith Logan, East Africa Director, Oxfam, in Frank Nyakairu, 'East Africa Drought Leaves Millions Hungry', *Reuters* (online), 29 September 2009 <<http://www.reuters.com/article/idUSTRE58S1F520090929>>.

¹⁰⁴ Foresight, above n 5, 70.

households to these changes.’¹⁰⁵ It is clear that areas affected ‘frequently experience net outmigration’,¹⁰⁶ both as displacement or more ‘routine’ (economic) migration, with the difference sometimes blurred.¹⁰⁷ Overwhelmingly, studies linking drought, drylands/desert margins and people movement highlight mobility in this context as a ‘customary coping strategy’, a ‘response to spatio-temporal variations in climatic and other conditions’.¹⁰⁸

Jon Barnett and Michael Webber¹⁰⁹ suggest that present and past movements generally may be a good guide to future movement. A large variety of research suggests that drought and desertification is connected to mobility: Jan van Apeldoorn¹¹⁰ noted how drought in Nigeria in the 1970s impacted upon mobility patterns there. Markos Ezra and Gebre-Egziabhar Kiros¹¹¹ linked drought to people movement induced by food insecurity in Ethiopia. Robert McLeman et al and Robert McLeman and Barry Smit’s¹¹² studies of displacement from American mid-Western dustbowl affected communities in the 1930s show how poverty, multiple other socio-economic, as well as environmental factors influenced the nature and extent of displacement in concert. Michelle Leighton analyses a multitude of other examples.¹¹³ Although not denying that such movement is in response to harsh and unpredictable environments, rather than emphasizing it as a problem, most of these

¹⁰⁵ Koko Warner et al, ‘When the Rain Falls’, above n 5, 112.

¹⁰⁶ Foresight, above n 5, 70.

¹⁰⁷ Ibid, 7f.

¹⁰⁸ Black, above n 45, 6.

¹⁰⁹ Jon Barnett and Michael Webber, ‘Accommodating Migration to Promote Adaptation to Climate Change’ (Policy Brief Prepared for the Swedish Commission on Climate Change and the World Bank World Development Report 2010, 2009) 17.

¹¹⁰ G Jan van Apeldoorn, *Perspectives on Drought and Famine in Nigeria* (Allen & Unwin, 1981).

¹¹¹ Markos Ezra and Gebre-Egziabhar Kiros, ‘Rural Out-Migration in the Drought-Prone Areas of Ethiopia: A Multi-Level Analysis’ (2001) 35 *International Migration Review* 749.

¹¹² Robert McLeman, Dick Mayo, Earl Strebeck and Barry Smit, ‘Drought Adaptation in Rural Eastern Oklahoma in the 1930s: Lessons for Climate Change Adaptation Research’ (2007) 13 *Mitigation and Adaptation Strategies for Global Change* 379 and Robert McLeman and Barry Smit, ‘Migration as an Adaptation to Climate Change’ (2006) 76 *Climatic Change* 31.

¹¹³ Michelle Leighton, ‘Desertification and Migration’ in Pierre Marc Johnson, Karel Mayrand and Marc Paquin (eds), *Governing Global Desertification* (Ashgate, 2006) 43; as does Morrissey, above n 6, 19ff.

(and other) studies largely confirm it as a viable and common adaptive solution to environmental uncertainty and vulnerability.¹¹⁴

Again, the relationship between climatic event (lack of rain, drought) and mobility is not mono-causal.¹¹⁵ Poverty and other pre-existing vulnerabilities interact with environmental factors to contribute to mobility or lack thereof.¹¹⁶ Implementing adaption measures may counter at least some pre-existing vulnerabilities; however, individuals, communities or authorities in poorer drought-prone regions may also struggle to support the necessary measures.¹¹⁷

Severe or Extreme Weather Events and Natural Disasters

There is little doubt that ‘migration correlates with natural disasters [...]. Shocks stimulate people to migrate to escape the negative effects of disasters.’¹¹⁸ Extreme climatic events such as Hurricane Katrina in 2005 and the precipitation that led to severe flooding in Pakistan in 2010, for example, leave little doubt about the often significant displacement consequences of natural disasters. Flight after such events is generally considered forced (or involuntary).¹¹⁹ The Internal Displacement Monitoring Centre and Norwegian Refugee Council cite 32.4 million people as having been newly displaced by natural disasters in 2012, 16.4 million in 2011, a particularly staggering 42.3 million in 2010, 16.7 million in 2009 and 36.1 million in 2008 – the majority by weather-related and not geophysical events.¹²⁰ Climate

¹¹⁴ Black, above n 45, 6, relying on Johann Pottier, ‘Migration as a Hunger-Coping Strategy: Paying Attention to Gender and Historical Change’ in Henrik S Marcussen (ed), *Institutional Issues in Natural Resource Management* (Roskilde University, 1993) 201.

¹¹⁵ See also Foresight, above n 5, s 3.2.

¹¹⁶ Ibid, 73; also Morrissey, above n 6, 19ff.

¹¹⁷ Koko Warner et al, ‘When the Rain Falls’, above n 5, 112

¹¹⁸ Bruce Murray, *Mass Migration – A Worldwide Phenomenon* (2009) <http://www.analysisonline.org/site/aoarticle_display.asp?sec_id=140002434&news_id140001396&issue_id=1>.

¹¹⁹ Asmita Naik, ‘Migration and Natural Disasters’ in Laczko and Aghazarm, above n 5, 295.

¹²⁰ Internal Displacement Monitoring Centre and Norwegian Refugee Council, ‘Global Estimates 2012: People Displaced by Disasters’ (2013) 6, 11.

change will undoubtedly exacerbate the occurrence of extreme weather events and natural disasters: for example, since 1950, heat waves have occurred more regularly and since at least the 1970s, and despite variability from year-to-year (which at least partially explains the variability in displacement figures just noted), there have been noted increases in the intensity and duration of storms or hurricanes.¹²¹ The IPCC highlights in one of its reports that

[i]f disasters occur more frequently and/or with greater magnitude, some local areas will become increasingly marginal as places to live or in which to maintain livelihoods. In such cases, migration and displacement could become permanent and could introduce new pressures in areas of relocation. For locations such as atolls, in some cases it is possible that many residents will have to relocate.¹²²

Even single events can have massive displacement consequences: a single large event in 2010 (flooding in China), for example, displaced 15.2 million people.¹²³ Nearly 90 percent of environment-related displacement in 2011 was attributable to just a quarter of all natural disasters which occurred.¹²⁴

Concerning storms, there can be little doubt that the devastation they wreak leads to displacement. Experience with Hurricane Katrina in the United States evidences this, for example.¹²⁵ A noteworthy caveat to this, however, is noted by Morrissey, who argues that ‘marginalised groups [are often] forced to occupy lands more exposed to “natural disasters”’ such as storms in the first place. The term (*natural* disaster) therefore ‘hides the social elements of the processes which leave

¹²¹ Intergovernmental Panel on Climate Change, above n 74, 107.

¹²² Intergovernmental Panel on Climate Change, ‘Summary for Policy Makers’ in *Intergovernmental Panel on Climate Change Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (Cambridge University Press, 2011) 14.

¹²³ Internal Displacement Monitoring Centre and Norwegian Refugee Council, ‘Global Estimates 2011: People Displaced by Natural Hazard-Induced Disasters’ (2012), 4. Note that IDMC figures are estimates – based on cross-checked information from relevant sources (e.g. government, international organisations, media, etc.).

¹²⁴ Ibid.

¹²⁵ See, eg, Foresight, above n 5, 13. Other studies, concerning other storms, also evidence this; see, eg, John C Belcher and Frederick L Bates, ‘Aftermath of Natural Disasters: Coping Through Residential Mobility’ (1983) 7 *Disasters* 118.

marginalised groups more exposed' in the first place.¹²⁶ In other words, extreme climatic events become more hazardous also because of particular vulnerabilities and exposure existing in certain localities¹²⁷ – lack of early warning, poor housing stock, habitation in hazardous locations, etc.¹²⁸ Despite being particularly vulnerable or exposed, without assistance affected populations may sometimes struggle to move when a disaster has occurred, even when they should or desire to.¹²⁹ Or they will move into equally or more dangerous areas.¹³⁰

Though not always the case, there is evidence that those displaced by natural disasters or extreme weather events can and often do eventually return, sometimes quite rapidly.¹³¹ However, their ability to do so is dependent on factors such as the availability of economic resources.¹³² Local economies may struggle to recover from what otherwise amounts to only 'temporary disruption' following disasters and displacement.¹³³ So people return, but to greater hardship and vulnerability, unless supported.

5. Utility and Complexity: What Does This Mean for Justice and for International Law?

Several matters of importance for the analysis to follow in later chapters arise out of the material thus far presented. One, in particular, emerges from the early 'maximalist' discourse concerning the environment/climate change and displacement, and the various representational tools (mass flight, refugee influx,

¹²⁶ Morrissey, above n 6, 32.

¹²⁷ Intergovernmental Panel on Climate Change, above n 122, 8.

¹²⁸ Naik, above n 119, 275f.

¹²⁹ Foresight, above n 5, s 3.3.

¹³⁰ Ibid.

¹³¹ Naik, above n 119, 289.

¹³² Foresight, above n 5, 48.

¹³³ Ibid, 177.

crisis, etc.) used to bolster it. Sensationalising the issue through deployment of a number of devices certainly increased its visibility and prominence. This, it was frequently hoped, would stimulate action on environmental matters that were felt to be increasingly urgent, including climate change.¹³⁴ ‘Climate refugees’ or ‘environmental refugees’ therefore had utility for environmental purposes – but seemingly only if they could also be construed as a potential problem – to global, regional or domestic stability, for example.¹³⁵ Such conceptualisations, however, may not only have been factually, conceptually or methodologically misplaced (the numbers proposed are not realistic, persons concerned would not be refugees, environmental factors do not compel displacement alone) but also have consequences for both justice and international law considerations of climate change displacement, the framing components of this thesis.

First of all, it is true that international law pays little attention to the elusive. Commentators have repeatedly pointed out international law and-policy’s tendency to be overwhelmingly responsive only to crisis,¹³⁶ or events, instances or phenomena which are perceived to be critical.¹³⁷ Johns et al argue that it is amongst certain stand-out moments that ‘international lawyers have prospected [...] for certain possibilities for international law.’¹³⁸ Emphasizing the heightened character of phenomena is therefore indeed often important to break through to a lethargic system. The image of the nearly-drowned islander, or a ‘postcard from the future’ depicting large refugee camps in the center of a Western capital city therefore hold

¹³⁴ See, eg, Farbotko, above n 47 and Morrissey, above n 8.

¹³⁵ Eg, Morrissey, above n 8.

¹³⁶ See, eg, Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65 *Modern Law Review* 377.

¹³⁷ Fleur Johns, Richard Joyce and Sundhya Pahuja, ‘Introduction’ in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge, 2010) 1.

¹³⁸ *Ibid*, 2.

great strategic potential in making those pay attention who might otherwise not.¹³⁹ The problem is that ‘crisis-talk’ (even that which has the perhaps admirable goal to stimulate environmental action) also encourages an ‘international law world’ prone to support muscular or militant response.¹⁴⁰ In portraying climate change displacees as a problem (e.g. of international and domestic security and stability or as a potential welfare state burden in receiving countries), the possibility of legitimizing very undesirable responses against them is raised (at worst, the use of force) and therefore not the best is asked of the ‘international law world’ for potential displacees. The dichotomy set up in the process – victim = potential host states, regions or communities; culprit = displacees – also impacts upon justice considerations. Justice, in essence, stipulates that amongst interacting parties, each is to be granted what it is due.¹⁴¹ This presupposes that none is unduly victimized (corrective justice) or disadvantaged (distributive justice). However, a construction of climate change displacees as culprits (problems) largely precludes their conceptualization in those terms.

Commendably, the climate change (and environmental) migration and displacement field has begun to move on from its early reliance on blunt representational tools. An increasingly nuanced picture is emerging of interactions between people and *some* of the complex and varied factors which interact with climate change effects to influence mobility – for example, vulnerability, inequality, poverty, but also human adaptability and agency, etc.¹⁴² Many varied expressions of mobility (or lack thereof) in response to multiple factors have been uncovered.

¹³⁹ See, eg, Morrissey, above n 8.

¹⁴⁰ See Hilary Charlesworth, above n 136.

¹⁴¹ Ch 4 of this thesis deliberates this in greater detail; see also The Law Dictionary, *Justice* (2012) <<http://thelawdictionary.org/justice-n/>>

¹⁴² See, eg, Carol Farbotko, ‘Review: Climate Change and Displacement: Multi-disciplinary Perspectives’ (2012) 36 *Progress in Human Geography* 833.

However, nuance and complexity also have consequences for both international law and justice-based analyses of the climate change displacement. For international law, on the one hand, a greater relevance is evoked for more of its many branches and sub-branches. Uncovering this will be the purpose of the next chapter. However, in an ‘international law world’ overwhelmingly responsive to crisis – that is acute, prominent *threats* – phenomena which are nuanced or complex also face challenges. As Martti Koskenniemi has argued, they may simply ‘slowly disappear as part of the background so that we can no longer distinguish anything remarkable in it’.¹⁴³ The effect this produces is that they are conceived as ‘business as usual’ and thereby possibly condemned to an indifferent international law and policy arena,¹⁴⁴ also the subject of greater investigation in the chapter to follow.

And nuance and complexity have ramifications also for justice considerations. The contribution this thesis will seek to make to the international law scholarship on climate change and displacement is of course a justice-based analysis of the intersection of the two. However, at the heart of justice enquiries is the question of responsibility – for harm, loss damage or disadvantage, for example. Justice-based enquiries seek to establish whether something has been unjustly denied or taken from an entity – which would then warrant a claim against any entity (or entities) found to be responsible. Complex, nuanced, multi-causal chains of interacting factors naturally complicate and bind any such enquiry, a dynamic paid attention to and dissected in many of the chapters to follow.

¹⁴³ Martti Koskenniemi, ‘Foreword’ in Johns et al, above n 137, xvii, xvii.

¹⁴⁴ Ibid and Fanny Thornton, ‘Climate Change, Displacement and International Law: Between Crisis and Ambiguity’ (2013) 30 *Australian Yearbook of International Law* 147.

6. Conclusion

Climate change and displacement is undoubtedly a complex phenomenon influenced by interacting causes and effects, including the effects of a changing climate. Although any movement associated with climate change will not be compelled solely by the impacts of climate change, a two-fold consensus is emerging: a) that, with climate change, there will be an increase in the occurrence of more climate extremes;¹⁴⁵ and b) that there is at least ‘medium agreement’ and ‘medium evidence’¹⁴⁶ supporting the notion that ‘[d]isasters associated with climate extremes influence population mobility and relocation, affecting host and origin communities’.¹⁴⁷ In other words, the relationship is not negligible (or ‘limited’ given the IPCC terminology): anthropogenic climate change impacts on global average temperatures and with it climatic events and rising seas, which, in confluence with other factors, contributes to the movement of people in complex ways. Assuming that the resulting ‘affect upon host and origin communities’ is one considered undesirable (not what is due), this begs the question whether those contributing to anthropogenic climate change, thereby contributing to displacement, are responsible for (at least some of) the ill effects generated, from which certain consequences should then arise. The international law scholarship on climate change and displacement has hesitated to explore this question in any detail. The reasons for this are multiple and, arguably, plausible: causality issues seem too complex, responsibility questions could turn the discourse into a ‘blame game’. However, causal chains contributing to displacement do include *anthropogenic* climate change

¹⁴⁵ Intergovernmental Panel on Climate Change, above n 122, 10ff.

¹⁴⁶ The IPCC has outlined what such terms might mean; see Intergovernmental Panel on Climate Change, ‘Guidance Note for Lead Authors of the IPCC Fifth Assessment Report on Consistent Treatment of Uncertainties’ (2010). In other words, in the case of mobility, there is more than ‘low agreement’ or ‘limited evidence’.

¹⁴⁷ Intergovernmental Panel on Climate Change, above n 122, 14.

and its effects. So asking if certain responsibilities and consequences could arise from this is equally valid. Doing so, this thesis will employ a justice lens through which a relationship between doer and sufferer will be set up and analysed. Justice and ethical considerations are employed regularly when discussing responsibility for, and resolution of, many (inter-country and other) aspects concerning climate change:¹⁴⁸ for example, the distribution of greenhouse gas emissions or the sourcing and allocation of adaptation funding. There is no reason not to apply this approach also to the question of climate change and displacement. Before embarking on setting up the justice framework and justice-based analysis in later chapters, the following chapter will first interrogate the international law scholarship on the subject.

¹⁴⁸ See, eg, the many contributions in S Gardiner, S Caney, D Jamieson and H Shue, *Climate Ethics: Essential Readings* (Oxford, Oxford University Press, 2010).

CHAPTER 3

Climate Change, Displacement and International Law: Response or Responsibility?

Before the law stands a doorkeeper. To this door-keeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. 'It is possible,' says the doorkeeper, 'but not at the moment.' Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: 'If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the door-keepers.' [...] The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years.¹

(Franz Kafka, 1925)

1. Introduction

International law scholarship concerning climate change and human displacement has grown in recent years.² With the increasing appreciation of the inherent complexities and nuance highlighted in the previous chapter has come interest in the potential relevance of several of international law's sub-disciplines to displacement in the climate change context. Substantial inroads have thus been made into uncovering the possible significance of a wide range of international law's areas of speciality. These range from international refugee and human rights law to international disaster law and norms on humanitarian assistance, complementary protection, statelessness and some others. The substantive findings from these enquiries will be presented in the following sections. The chapter's purpose, however, also goes beyond this: it will show how the disciplinary focus is marked by

¹ Franz Kafka, 'Vor dem Gesetz' in *Der Process* [trans. Willa and Edwin Muir, 'Before the Law' in *The Trial* (Schocken Books, 1984)] [first published 1925].

² Note, in particular, the comprehensive analysis presented in Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012).

two inter-related constraints. First, it is overwhelmingly concerned with uncovering the relevance of the norms of the positive law. This means the discipline is engrossed in the asking of many very important questions but not always other, equally salient ones, including concerning justice, the focus of this thesis.³ As Martti Koskeniemi highlights, ‘positive law is always insufficiently expressive of justice.’⁴ This has contributed to a second constraint: a focus on uncovering opportunities for how displacement in the climate change context is best responded to, how to deal with its consequences – *through* the positive law (and various policy routes). A range of options have been proposed, depending on how movement is conceptualised: as a protection issue, a human rights issue, a humanitarian issue, etc.⁵ In relation to most of these, the following sections will show, the discipline has revealed that a robust response is improbable and that only some possibilities are raised for dealing with the consequences of displacement in the climate change context. Commonly excluded from most such deliberation is a conceptualisation of such movement as an issue of responsibility – for harm, damage or disadvantage, for example. In other words, the discipline has been hesitant to formulate conceptualisations that consider

³ Rare exceptions include Peter Penz, ‘International Ethical Responsibilities to “Climate Refugees”’ in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2011) 153, who considers briefly both compensation and insurance as corrective justice, also the focus of later chapters. Also Angela Williams, ‘Achieving Justice within the International Legal System: Prospects for Climate Refugees’ in Benjamin J Richardson, Yves Le Bouthillier, Heather McLeod-Kilmurray and Stepan Wood (eds), *Climate Law and Developing Countries* (Edward Elgar, 2009) ch 4, who briefly considers remedial and distributive justice. Also some consideration of the notion of ‘restorative justice’ in Roger Zetter, ‘The Role of Legal and Normative Frameworks for the Protection of Environmentally Displaced People’ in Frank Laczko and Christine Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (International Organization for Migration, 2009) 385. Laura Westra has considered environmental justice issues in relation to the environmentally displaced more generally; see Laura Westra, *Environmental Justice and the Rights of Ecological Refugees* (Earthscan, 2009).

⁴ Martti Koskeniemi, ‘What is International Law For?’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 2003) 57, 78. Jean-François Durieux also highlights a gap concerning (climate) justice in scholarship about the relationship between climate change, people movement and international law; see Jean-François Durieux, ‘Book Review: Climate Change, Forced Migration, and International Law’ (2013) 25 *International Journal of Refugee Law* 187, 189.

⁵ See Jane McAdam, ‘Refusing “Refuge” in the Pacific: (De)Constructing Climate-Induced Displacement in International Law’ in Etienne Piguet, Antoine Pécoud and Paul de Guchteneire (eds), *Migration, Environment and Climate Change* (UNESCO, 2011) 102, 107.

the full breadth of root causes of displacement (i.e. human involvement) in the climate change context, and any consequences or obligations which could or should arise from *this*, something the justice-based enquiry central to this thesis will seek to do in later chapters. The following sections will first outline the key findings which have emerged in the scholarship and then note the gap this thesis seeks to fill.

2. Refugeehood?

A preoccupation with the idea that climate change is capable of ‘producing’ refugees, especially on a large scale, was noted in Chapter Two. Despite the popularity of this idea, however, the path to refugeehood is strewn with several well-rehearsed, significant obstacles for persons affected by environmental or climatic change. The starting point for such contemplation is usually Article 1(A)2 of the 1951 Refugee Convention,⁶ which stipulates that a refugee is any person who

[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

That this does not include all those who flee grave circumstances, including those who may have to escape the effects of climate change, has been pointed out by many.⁷ Although some have called for modifications to the Convention whereby

⁶ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954); henceforth also ‘Refugee Convention’ or ‘Convention’ as appropriate – to be read in conjunction with the *Protocol Relating to the Status of Refugees*, adopted 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) art 1(2); henceforth also ‘Refugee Convention Protocol’, ‘1967 Protocol’ or ‘Protocol’ as appropriate.

⁷ See, eg, Angela Williams, ‘Turning the Tide: Recognizing Climate Change Refugees in International Law’ (2008) 30 *Law and Policy* 502; Aurelie Lopez, ‘The Protection of Environmentally-Displaced Persons in International Law’ (2007) 37 *Environmental Law* 365; Roger Zetter, above n 5 and Jane McAdam, above n 2 (and elsewhere).

those escaping environmental stressors could be recognised as refugees,⁸ for the time being three reasons in particular are noted that prevent the Convention from applying to the environmentally-displaced: First, Convention refugees are supposed to be unable to avail themselves of the protection from persecution by their *own* government (the government, one of its agents or even a non-state agent⁹). It may be very difficult to construe that a person's own government is somehow the persecutory agent, or that *it* has failed to prevent *persecution*, where harm has occurred as a result of climate change effects.¹⁰ Secondly, even if it was somehow possible to locate persecutory elements in the detrimental consequences arising in connection with climate change, persecution would still have had to occur for one of five carefully delineated Convention reasons – namely, race, religion, nationality, membership of a particular social group or political opinion. Jessica Cooper has discussed how victims of environmental harm or damage, which purportedly could include that induced by climate change, might belong to a 'social group' that lacks

⁸ See, eg, Ministry of Environment, Energy and Water, Republic of the Maldives, 'Report on the First Meeting on Protocol on Environmental Refugees: Recognition of Environmental Refugees in the 1951 Convention and 1967 Protocol Relating to the Status of Refugees' (14-15 August 2006); cited in Frank Biermann and Ingrid Boas, 'Protecting Climate Refugees: The Case for a Global Protocol', *Environment* (online), November/December 2008 <<http://www.environmentmagazine.org/Archives/Back%20Issues/NovemberDecember%202008/Biermann-Boas-full.html>>; also Jessica B Cooper, 'Environmental Refugees: Meeting the Requirements of the Refugee Definition' (1998) 6 *NYU Environmental Law Journal* 480, 523-526, who has argued that no modification is necessary as the 'membership of a particular social group' ground applies; see discussion below. Note in this context also an Australian Greens party initiative to push for an 'environmental refugee' category under the *Migration Act 1958*; although the initiative failed in 2007 (see also Migration (Climate Refugee) Amendment Bill 2007 (Cth)), it is still currently (April 2013) listed as a policy goal on the party's website; see Australian Greens, *Immigration and Refugees: Principles* <<http://greens.org.au/policies/care-for-people/immigration-and-refugees>>.

⁹ Regarding the latter see, eg, Walter Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 *Georgetown Immigration Law Journal* 415.

¹⁰ In the 'environmental refugee' context, Christopher Kozoll has argued that 'persecution' may occur in at least two circumstances: a) when 'a government systematically imposes risks and burdens of decisions impacting environmental quality on members of a particular race, religion, nationality, social group or political opinion on account of one or more of these protracted factors' and b) 'where the relevant authority refuses to mitigate or mitigates inadequately environmental disasters, whether of human origin or not, and in so doing 'targets' a group based on one of the listed factors'; see Christopher Kozoll, 'Poisoning the Well: Persecution, the Environment and Refugee Status' (2004) 15 *Colorado Journal of International Environmental Law and Policy* 271, 273-274. However, this presupposes a degree of targeted malicious intent by government or its agents.

the power and influence to prevent environmental factors from impacting them negatively.¹¹ However, although the ‘membership of a particular social group’ criteria, in particular, is meant to be flexible and was intended to cover at least some potential gaps not covered by the other four grounds,¹² persons concerned would still have to show a ‘fundamental immutable characteristic’ that is not the stipulated persecution itself to qualify as refugees.¹³ Dana Zartner Falstrom notes that ‘political powerlessness is not an immutable characteristic that will make a person or group of persons members of a particular social group’, unless something else connects them further and thus defines them as a social group.¹⁴ A third challenge relates to the fact that the path to refugeehood should include an international border crossing, which in the case of displacement in the climate change context may not always (or even often) be the case.¹⁵ Despite such obstacles, Refugee Convention claims in relation to the feared impacts of climate change are not completely the stuff of legal fiction, although those who have applied for refugee status have not been successful. In a case involving an applicant from Kiribati, for example, who feared ‘return to his country of nationality because there is substantial scientific evidence that rising sea levels will devastate that country’,¹⁶ the Australian Refugee Review Tribunal held in 2009 that

¹¹ Cooper, ‘above n 8, 523-526. She argues that the environmental justice movement accepts this.

¹² Lopez, above n 7, 382. Though note that it is not meant to be a ‘catch-all criteria’ and has not been applied as such.

¹³ Jane McAdam and Ben Saul, ‘An Insecure Climate for Human Security? Climate-Induced Displacement and International Law’ in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010) 357, 372.

¹⁴ Dana Zartner Falstrom, ‘Stemming the Flow of Environmental Displacement: Creating a Convention to Protect Persons and Preserve the Environment’ (2002) 13 *Colorado Journal of International Environmental Law and Policy* 1, 13.

¹⁵ See, eg, United Nations Framework Convention on Climate Change, *Climate Change, Migration and Displacement: Who Will Be Affected? Working Paper Submitted by the Informal Group on Migration/Displacement and Climate Change of the IASC, 31 October 2008* (2008), 1 <<http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf>>.

¹⁶ 0907346 [2009] RRTA 1168 (10 December 2009) para 47.

[i]n this case, the Tribunal does not believe that the element of an attitude or motivation can be identified, such that the conduct feared can be properly considered persecution for reasons of a Convention characteristic as required. [...] There is simply no basis for concluding that countries which can be said to have been historically high emitters of carbon dioxide, or other greenhouse gases, have any element of motivation to have any impact on residents in low-lying countries such as Kiribati, either for their race, religion, nationality, membership of any particular social group or political opinion.¹⁷

Partially in recognition of the fact that the Refugee Convention definition is restrictive, several regional instruments have emerged in the decades since the 1951 Convention which provide broader pathways to refugeehood. For example, the Organization of African Unity (OAU)¹⁸ 1969 *Convention Governing the Specific Aspects of Refugee Problems in Africa* reaffirms the Refugee Convention definition but then states

the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole of his country or origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.¹⁹

This, too, does not expressly refer to the possibility of refugeehood in relation to environmental reasons. However, should environmental events ‘seriously disturb the public order’, affected persons could, conceivably, fall under protection obligations in this region.²⁰ Indeed, in relation to the Convention and other relevant provisions,²¹ Vikram Kolmannskog cites a Kenya-based officer of the Office of the United Nations High Commissioner for Refugees (UNHCR) as stating: ‘If drought and

¹⁷ Ibid, para 51.

¹⁸ Disbanded and replaced by the African Union (AU) in 2002.

¹⁹ *Convention Governing the Specific Aspects of Refugee Problems in Africa*, signed 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) art 1; henceforth also ‘African Convention’, ‘OAU Convention’ or ‘Convention’ as appropriate.

²⁰ See Walter Kälin, ‘Conceptualising Climate-Induced Displacement’, in McAdam, above n 3, 81, 88; also Lopez, above n 7, 390.

²¹ In this case, the *Refugees Act*, 2006 [Kenya], no 13 of 2006 (30 December 2006) <<http://www.unhcr.org/refworld/country,,NATLEGBOD,KEN,456d621e2,467654c52,0.html>>, which recognises as refugees those who fall under the 1951 and OAU Conventions.

conflict coincide, we will not split hairs²² when determining the status of persons displaced from Somalia. Nevertheless, there are some doubts that regional states are 'ready to accept [...] an expansion of the concept [disturbing the public order] beyond its conventional meaning of public disturbances resulting in violence.'²³ Alice Edwards has argued that when displacees from natural disasters are hosted in the region, 'receiving states rarely declare that they are acting pursuant to their OAU Convention obligations.'²⁴ Finally, even where persons meet the additional, broader criteria set forth in the African Convention (but not the 1951 Convention criteria), protection obligations thus raised are temporary and such persons can be prevented from remaining permanently in the host state.²⁵ This poses problems in applying the African Convention in contexts where return may not be an option.

Likewise, the Organization of American States (OAS) 1984 *Cartagena Declaration on Refugees* provides that

in addition to containing the elements of the 1951 Convention [...] and the 1967 Protocol [...], among refugees [should be included] persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, mass violations of human rights or other circumstances which have seriously disturbed the public order.²⁶

The International Conference on Central American Refugees has previously made an important distinction in relation to 'circumstances which have seriously disturbed the public order', however: in interpreting the Declaration, it has differentiated persons affected by disruptive 'human-made events' as opposed to those affected by 'natural

²² Vikram Kolmannskog, 'Climate Change, Human Mobility and Protection: Initial Evidence from Africa' (2010) 29 *Refugee Quarterly* 103, 112.

²³ Kälin, above n 20, 88.

²⁴ Alice Edwards, 'Refugee Status Determination in Africa' (2006) 15 *African Journal of International and Comparative Law* 204, 227; also McAdam and Saul, above n 13, 8.

²⁵ See Lopez, above n 7, 390 and Cooper, above n 8, 498.

²⁶ *Cartagena Declaration on Refugees*, adopted 22 November 1984, in Annual Report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II.66/doc.10, rev1, 190, art 3; henceforth also 'Cartagena Declaration' or 'Declaration' as appropriate.

disasters', with only the former eligible to be recognised as refugees.²⁷ A creative interpretation of this restriction means that acceptance of the anthropogenic (human-made) nature of climate change could lead those displaced by its effects to be recognised as refugees in the region, an unlikely scenario, however. Furthermore, it is important to note that, unlike the OAU Convention, the Declaration is not binding.²⁸

International refugee law has been found to provide a very limited array of opportunities for potential protection seekers in the climate change context. Of course, challenges arising from the law are joined by structural ones. Although broader 'refugee' conceptualisations have emerged in regional contexts in recent decades, the 'climate change *refugee*' discourse enters the global stage at a time of increasing restrictions concerning asylum seekers and refugees (often justified by the 'myth of difference' introduced in the previous chapter), with wealthy nations, in particular, curtailing rights and commitments where possible.²⁹ In this process, 'legal categories' become 'devices for inclusion but also of exclusion'.³⁰ Roger Zetter has shown how the 'refugee' category has become 'blurred' over time. Frequently, asylum seekers and refugees are detained or housed in despicable conditions and have limited access to legal or social support systems.³¹ Willing 'climate change *refugees*' into being is therefore questionable also in light of a system that not only

²⁷ 'Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America', UN Doc CIREFCA/89/9 (January 1990) [English version]; in Lopez, above n 7, 390.

²⁸ Note, however, that it has been incorporated into the national legislation of several regional states and, to a significant degree, forms the basis of refugee policy in the region.

²⁹ See, eg, Adam Roberts, 'More Refugees, Less Asylum: A Regime in Transformation' (1998) 11 *Journal of Refugee Studies* 375. Amnesty International has noted the rising dangers faced by many of the world's refugees; see Amnesty International, 'Amnesty International Report 2013: The State of the World's Human Rights' (2013).

³⁰ For more on this dynamic see, B S Chimni, 'The Birth of a "Discipline": From Refugee to Forced Migration Studies' (2009) 22 *Journal of Refugee Studies* 11, 12.

³¹ See on this Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization' (2007) 20 *Journal of Refugee Studies* 172; also B S Chimni, 'Globalisation, Humanitarianism and the Erosion of Refugee Protection' (Working Paper No 3, Refugee Studies Centre, Oxford University, 2000).

will not recognise them but would condemn them to hopeless lives even where, somehow, it did.³²

3. Statelessness?

The 'climate change refugee' notion usually entails the assumption that spaces have become uninhabitable or livelihoods ruined through climatic impacts, forcing those affected to move elsewhere. Something possibly more dramatic and traumatic is envisioned by others: that whole nations might altogether disappear under rising sea-levels, forcing their inhabitants to abandon their homelands and seek shelter elsewhere as stateless persons.³³ Noted in this context in particular are small island nations in the South Pacific and Indian Ocean, which have come to be referred to as 'sinking islands' or 'disappearing states' in the climate change context. States concerned have highlighted this possibility in the international arena themselves. For example, in debates from which, in 2009, emerged a General Assembly Resolution on 'Climate Change and its Possible Security Implications',³⁴ Kalkot Matas Kelekele, President of Vanuatu, noted that

some Pacific colleague nations will be submerged. If such a tragedy should happen, then the United Nations and its members will have failed in their first and most basic duty to a Member and its innocent people, as stated in Article 1 of the Charter of the United Nations.³⁵

Similarly, Marcus Stephens, President of the Republic of Nauru, urged

³² See Jane McAdam and Maryanne Loughry, 'We Aren't Refugees', *Inside* (online), 30 June 2009 <<http://inside.org.au/we-arent-refugees/>>; the authors highlight Pacific Islander hesitation in relation to the refugee designation in the climate change displacement context.

³³ See, eg, Nicholas Schmidle, 'Wanted: A New Home for my Country', *The New York Times* (online), 10 May 2009 <<http://www.nytimes.com/2009/05/10/magazine/10MALDIVES-t.html?page=wanted=all&r=0>>.

³⁴ UN GAOR, 63rd sess, 'Climate Change and its Possible Security Implications', UN Doc A/RES/63/281 (11 June 2009).

³⁵ UN GAOR, 63rd sess, 11th plen mtg, UN Doc A/63/PV.11 (26 September 2008), Mr Kalkot Matas Kelekele.

the Security Council [to] review particularly sensitive issues such as the implications of the loss of land and resources and the displacement of people for sovereignty and international legal rights.³⁶

What drives concern about ‘sinking islands’ or ‘disappearing islands’ is their particular physical and geographical characteristics. Island nations such as Tuvalu, Kiribati and the Maldives each peak out of the ocean by little more than a few metres. Some island nations have an average altitude of no more than one or two metres.³⁷ It is thought that such low elevations make them particularly susceptible to sea-level rise, and even complete submergence.

For international lawyers, this has led to the asking of an array of questions, including whether states ever really cease to exist (‘disappear’), or whether affected persons could be legally regarded as stateless and thereby become subject to international protection.³⁸ Regarding the former, what has been found is that international law does consider the vanishing of a state, though usually in relation to ‘absorption by another state’, ‘merger with another state’ or ‘dissolution with the emergence of a successor state’ – thus ‘in the context of state succession’.³⁹ Jane McAdam has argued that the vanishing of a state as a result of rising seas is manifestly different, because any territory lost is presumably not available to another.⁴⁰

³⁶ UN GAOR, 63rd sess, 9th plen mtg, UN Doc A/63/PV.9, (25 September 2008), Mr Marcus Stephen.

³⁷ Susin Park, ‘Climate Change and the Risk of Statelessness’ (Office of the United Nations High Commissioner for Refugees, 2011) 1.

³⁸ See Jane McAdam, ‘“Disappearing States”, Statelessness and the Boundaries of International Law’ in McAdam, above n 3, 105, 118. For more on statelessness, see also Kate Darling, ‘Protection of Stateless Persons in International Asylum and Refugee Law (2009) 21 *International Journal of Refugee Law* 742.

³⁹ McAdam, above n 38, 105, 106, 109; relying on James R Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006) ch 17. Note the two treaties on state succession: *Vienna Convention on Succession of States in Respect to Treaties*, signed 23 August 1978, 1946 UNTS 3 (entered into force 6 November 1996) art 2(1)(b) and *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, signed 8 April 1983 (not yet in force) art 2(1)(a).

⁴⁰ See McAdam, above n 38, 106.

Those envisioning disappearing states most often imply that island nations would cease to exist, or ‘disappear’, because they have simply lost their territory,⁴¹ through submergence following sea-level rise – no territory, no state, the logic goes. And indeed, as Rosemary Rayfuse points out:

[i]n an international community still based on the Westsphalian notion of states, it may not be appropriate or realistic to envisage the permanent establishment and continuing existence of deterritorialised states *ad infinitum*.⁴²

However, statehood may persist stubbornly. Thomas Grant has argued that ‘territory is not necessary to statehood, at least after statehood has been established [...]’. [O]nce an entity has established itself in international society as a state, it does not lose statehood by losing its territory or effective control over that territory.⁴³ McAdam has analysed more concretely how statehood may persist in relation to territory in the ‘sinking islands’ context, as well as in relation to a number of other statehood criteria.⁴⁴ She argues that ‘[w]hile all four criteria [defined territory, permanent population, effective government and capacity to enter into relation with other states] would seemingly need to be present for a state to come into existence, the lack of all four may not mean the end of a state [...] because of [a] strong presumption of continuity of existing states’.⁴⁵ This raises questions about if and when states will indeed lose their statehood, truly becoming ‘disappeared states’,

⁴¹ Ibid, 109.

⁴² Rosemary Rayfuse, ‘W(h)ither Tuvalu? International Law and Disappearing States’ (Working Paper No 9, Faculty of Law, University of New South Wales, 2009) 13.

⁴³ Thomas D Grant, ‘Defining Statehood: The Montevideo Convention and its Discontents’ (1999) 37 *Columbia Journal of Transnational Law* 403, 435; quoted in McAdam, above n 38, 7.

⁴⁴ McAdam, above n 38, 110ff. She argues that ‘the absence of population, rather than of territory, may provide the first signal that an entity no longer displays the full indicia of statehood’; *ibid*, 106. For statehood criteria, see the *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934). For suggestions, some quite creative, as to how states might continue to survive in relation to several statehood criteria, see Lilian Yamamoto and Miguel Esteban, ‘Atoll Island States and Climate Change: Sovereignty Implications’ (Working Paper No. 166, Institute of Advanced Studies, United Nations University, 2011); Maxine Burkett, ‘The Nation Ex-Situ: On Climate Change, Deterritorialized Nationhood and the Post-Climate Era’ (2011) 2 *Climate Law* 345; and McAdam, above n 38.

⁴⁵ McAdam, above n 38, 110.

which also has consequences for the second question that arises in the ‘sinking islands’ context – could affected populations be protected under international provisions concerning statelessness.

Statelessness is generally found to be an ‘anomaly to be prevented’.⁴⁶ Two conventions seek to do just that. However, their applicability to the ‘disappearing states’ notion has been found to be minimal. One, the 1961 *Convention on Reduction of Statelessness*,⁴⁷ asks states only to prevent statelessness when territory is re-allocated, in other words it concerns statelessness in the context of succession. The definition of a stateless person is further delineated as ‘a person who is not considered as a national by any State *under the operation of its law*’ in the other, the 1954 *Convention Relating to the Status of Stateless Persons*.⁴⁸ In other words, only persons stateless de jure would be recognised as such, persons who have no nationality through the operation of domestic law.⁴⁹ McAdam highlights that, in the case of small island nations at risk of territorial loss and population displacement as a result of climate change, the state would therefore officially have to withdraw nationality from its citizens and only thereby bring its population within the realm of

⁴⁶ Park, above n 37, 16; for expressions of a ‘right to nationality’ see, eg, art 15, Universal Declaration of Human Rights, adopted 10 December 1948, UNGA Res 217A; henceforth also ‘Universal Declaration’; art 7 of the *Convention on the Rights of the Child*, signed 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) stipulates ‘[t]he right to have a name from birth and to be granted a nationality’; also, the *International Covenant on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(3); also the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, signed 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003) art 29 and *Convention on the Elimination of all Forms of Discrimination against Women*, signed 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 9 and *International Convention on the Elimination of all Forms of Racial Discrimination*, signed 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) art 5(d)(iii); though note there is no duty to confer it.

⁴⁷ *Convention on Reduction of Statelessness*, signed 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) art 10; it is not ratified widely.

⁴⁸ *Convention Relating to the Status of Stateless Persons*, signed 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1(1) [italics by thesis author]; also not ratified widely.

⁴⁹ McAdam, above n 38, 119. Note the Office of the United Nations High Commissioner for Refugees, however: ‘affected ‘populations would be likely to find themselves largely in a situation that would be similar to if not the same as if statehood had ceased’; see United Nations High Commissioner for Refugees, *Climate Change and Statelessness: An Overview* (19 May 2009), 2 <<http://unfccc.int/resource/docs/2009/smsn/igo/048.pdf>>;

legally qualifying as stateless,⁵⁰ surely a despicable prospect for those concerned. *Risk* of territorial loss and population movement alone is not enough to trigger the provisions of the statelessness regime.⁵¹

It seems that, for now, the so-called ‘sinking islands’ or ‘disappearing states’ concepts have mainly strategic importance in two ways: first, they are often invoked by island nations themselves who want to draw attention to their particular vulnerabilities and plight. Secondly, they are invoked by those who depend on dramatic imagery to push for global climate change abatement measures.⁵² Those hopeful that the concept involves the possibility of recognition and protection of displaced persons under international norms on statelessness (‘some status at last’) have ended up as disappointed as those who hope for the same in relation to refugeehood. States simply do not disappear so easily or rapidly. Although the features that define states may eventually be affected to the point where states cease to exist,⁵³ this affords no solutions to displacees from small island-states which may emerge in the meantime. Only when a state has actually physically ceased to be a state, or when an organ of the state has withdrawn nationality from its citizens, could stateless persons be ‘created’. Not only are both terrifying prospects but even where they come to pass, a limited array of ‘solutions’ is available, curtailed by the limitations in the relevant regime and the limited uptake of relevant instruments.⁵⁴

⁵⁰ McAdam, above n 38, 120.

⁵¹ Ibid.

⁵² See, eg, Carol Farbotko, ‘Wishful Sinking: Disappearing Islands, Climate Refugees and Cosmopolitan Experimentation’ (2010) 51 *Asia Pacific Viewpoint* 47, McAdam, above n 5, 110 and McAdam, above n 38, eg 105, 107; see also the previous chapter.

⁵³ McAdam, above n 38, 128; also Park, above n 37, 23.

⁵⁴ McAdam, above n 38.

4. A New Treaty?

Recognition that both the international treaty regime concerning refugees and that concerning stateless persons would be of limited relevance to displaced persons in the climate change context has underpinned calls for the development of a new treaty or additions to, or amendments of, existing treaties. Proposals here include: a new treaty altogether, or additional protocols to either the 1951 Refugee Convention or the United Nations Framework Convention on Climate Change.⁵⁵ Such proposals envision a regime operated by either an existing organisation (i.e. UNHCR, UNFCCC) or a new international body. Despite their appeal, serious questions have, however, been raised about the viability and practicability of a treaty approach, in particular by McAdam,⁵⁶ who has highlighted the following concerns: First, if the point is to recognise and protect the environmentally displaced, or, more specifically, those displaced in connection with the impacts of climate change, it may be difficult to separate environmental factors or climatic events and their consequences as the sole drivers of displacement, which may make it difficult to formulate a viable delineation of those whom are to be protected.⁵⁷ Chapter Two highlighted that climate change impacts often interact with other factors in forcing people movement. Secondly, there are questions as to why a new instrument should privilege only one type of displacee not currently protected, in a world full of people who may deserve,

⁵⁵ See, eg, Biermann and Boas, above n 8; Frank Biermann and Ingrid Boas, 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' (2010) 10 *Global Environmental Politics* 60; Williams, above n 7; 'Draft Convention on the International Status of Environmentally-Displaced Persons' (2008) 4 *Revue Européenne de Droit de l'Environnement* 375 (a second draft was published in 2010); Bonny Docherty and Tyler Giannini, 'Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees' (2009) 33 *Harvard Environmental Law Review* 349.

⁵⁶ Jane McAdam, 'Swimming Against the Tide: Why a Climate Change Displacement Treaty is Not the Answer' (2011) 23 *International Journal of Refugee Law* 2. Further outlined in her book; see McAdam, above n 2, 186ff and also McAdam, above n 5.

⁵⁷ McAdam, above n 2, 187.

but also do not enjoy, this.⁵⁸ Thirdly, as has been pointed out before, movement in relation to the effects of climate change may well be internal, which means an instrument premised on international protection in a host state may not be most relevant.⁵⁹ Fourthly, the citizens of some nation states conceivably affected by displacement in the climate change context (if not now, certainly in future) may resist the notion of being recognised and protected under already-existing protection regimes (refugees) for reasons of the systemic weaknesses regarding protection already noted. Some kind of formal, refugee-like status, they fear, may not necessarily equate to dignified or acceptable treatment.⁶⁰ Other mechanisms (not protection-based) that facilitate their movement may be preferred (for example, labour migration).⁶¹ Finally, and more practically, McAdam notes that ‘political appetite’ for a new instrument is likely to be negligible in an environment in which many potential receiving states are already increasingly curbing their obligations towards the ‘other’.⁶²

The following illustrates the latter difficulty in particular: aware of the restrictive nature of the Refugee Convention, the Office of the United Nations High Commissioner for Refugees (UNHCR) hosted a ministerial-level meeting concerning, amongst other issues, external displacement in the climate change context at the end of 2011. One goal of the meeting was to seek agreement concerning the possible development of an international framework (soft law) instrument to pertain to such movement. In the end, however, UNHCR was faced with the majority of states parties evidencing a great reluctance to accept (or even

⁵⁸ Ibid, 187f.

⁵⁹ Ibid, 193f, 195.

⁶⁰ See also McAdam and Loughry, above n 32.

⁶¹ Ibid; and McAdam, ‘Swimming Against the Tide’, above n 56, 16ff and McAdam, above 2, 201ff.

⁶² Eg, McAdam, above n 2, 188, 197.

discuss) any new obligations.⁶³ A treaty-based approach to protection in the context of climate change displacement is therefore likely not realistic.

5. Complementary and Discretionary Protection?

With treaty-based recognition and protection unlikely, at least for now, another avenue of disciplinary enquiry has concerned complementary and discretionary protection.⁶⁴ Although ‘plagued by imprecision’,⁶⁵ as the name implies, complementary protection usually refers to protection which is complementary (additional) to that offered under the Refugee Convention and its Protocol. It concerns commitments to protect persons who cannot be removed from a host state for several, usually serious reasons not covered by the 1951 Convention; for example, because conflict rages in their home country, or because they fear persecution, albeit not for a Convention reason. The Convention itself prohibits states from expelling persons or returning them to places where their life or freedoms would be threatened for at least one of the aforementioned five Convention

⁶³ See Office of the United Nations High Commissioner for Refugees, *Challenges Relating to Climate Induced Displacement* (29 January 2013), 6 <<http://www.unhcr.org/refworld/docid/510a3a372.html>>. Note, however, the Nansen Initiative, inspired by a gathering of experts in Oslo in 2011 and financially supported by the governments of Norway and Switzerland (two countries which had pledged in the aforementioned ministerial meeting to assist UNHCR), as well as the European Commission. The Initiative’s overall goal is to foster a platform for continuing debate of the protection needs of those displaced across borders by natural disasters (in the context of climatic change and otherwise); see, eg, Walter Kälin, ‘The Nansen Initiative and the UN Guiding Principles for Internally Displaced Persons – Models for the Protection of Environmentally Displaced Persons’ (Speech Delivered at the Climate Friendly Convention: Millions of Displaced People Without Protection: Climate Change Induced Displacement in Developing Countries, Deutsche Gesellschaft für die Vereinten Nationen, Berlin, 29 January 2013); also *The Nansen Initiative* (2013) <<http://www.nanseninitiative.org/>>.

⁶⁴ See, eg, Jane McAdam, ‘Climate Change Displacement and International Law: Complementary Protection Standards’ (Office of the United Nations High Commissioner for Refugees, 2011); also some consideration in McAdam and Saul, above n 13.

⁶⁵ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 1.

reasons.⁶⁶ The principle of *non-refoulement*, more broadly, prohibits the expulsion or removal of persons to a receiving country where they would be at real risk of harm or maltreatment, though its legal character and scope is debated.⁶⁷ *Non-refoulement* obligations that do arise are commonly founded in international and domestic human rights norms. McAdam notes how this includes the prohibition to remove persons ‘at risk of arbitrary deprivation of life’ (invoking the human right to life enshrined in all important human rights treaties) and persons ‘at risk of torture, or cruel, inhuman or degrading treatment or punishment’ (invoking the prohibition of torture or cruel, inhuman or degrading treatment also common to many international rights instruments).⁶⁸ She argues that other human rights norms may also be relevant. However, for the most part, such provisions ‘permit a balancing test between the interests of the individual and the State, thus placing protection from *refoulement* out of reach in all but the most exceptional cases.’⁶⁹ Even applicability of the ‘inhuman or degrading treatment’ provision is carefully delineated to prevent socio-economic conditions from becoming a ground for *non-refoulement*.⁷⁰

Also plagued by imprecision, discretionary protection refers to usually temporary protection which falls within the ambit of sovereign discretion (and is therefore also outside the scope of Convention Protection).⁷¹ It is granted to persons who are not to be removed from a host country (at least temporarily) because they would otherwise face extraordinary circumstances, including the aftermath of a

⁶⁶ Art 33.

⁶⁷ See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) versus James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005).

⁶⁸ McAdam, above n 64, 16ff.

⁶⁹ Ibid, 17. For the relevance of socio-economic rights, see Michelle Foster, ‘Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complimentary Protection in International Human Rights Law (2009) *New Zealand Law Review* 257.

⁷⁰ Ibid.

⁷¹ Alice Edwards, ‘Temporary Protection, Derogation and the 1951 Refugee Convention’ (2012) 13 *Melbourne Journal of International Law* 1, 3.

natural disaster, at home. It offers emergency protection, commonly also in cases of 'mass influx' of protection seekers.⁷²

Many countries and regions have implemented complementary and discretionary protection measures, offering both temporary and longer-term protection in specified circumstances. Some are of certain relevance to displacement in the climate change context.⁷³ For example, many countries do not return non-nationals, where return would subject such persons to the after-effects of a severe natural disaster. The United States (US) provides Temporary Protected Status (TPS) to those who cannot return on account of 'an earthquake, flood, drought, epidemic, or other environmental disaster in the [origin] state resulting in a substantial, but temporary, disruption of living conditions'.⁷⁴ In the climate change context, this may be relevant to those who face return to the aftermath of a serious natural disaster. However, to be eligible for protection, a person must already be located in the United States, their home state must have formally requested TPS designation, the granting of which is discretionary, and, crucially, protection is envisaged to be temporary.⁷⁵ A person could neither escape a natural disaster to arrive in the US and be granted TPS, nor could a non-national in the US who is granted this status usually expect to stay for very long, certainly not permanently.

The European Union's (EU) Temporary Protection Directive also grants temporary protection, in instances of mass influx to

⁷² Ibid, 1f, 10f.

⁷³ Relevant schemes are reviewed, eg, in Susan F Martin, 'Climate Change and International Migration' (The German Marshall Fund of the United States, 2010) 3f, and McAdam, above n 64, 36ff. For further examples of complementary protection schemes see, eg, Office of the United Nations High Commissioner for Refugees, *Complementary Protection in Europe* (29 July 2009) <<http://www.unhcr.org/refworld/docid/4a72c9a72.html>>.

⁷⁴ *Immigration and Nationality Act*, para 244, 8 USC para 125; TPS status has been granted on several occasions; e.g. following Hurricane Mitch in 1998 and 2010 Haiti earthquake. Note that, at times, longer-term protection has been offered through the provision, although this is not foreseen.

⁷⁵ Several authors have outlined these features: eg, McAdam, above n 64, 37f, and Martin, above n 73, 3.

‘[d]isplaced persons’ [...] who have had to leave their country of origin, or have evacuated [...] and are unable to return in safe and durable conditions because of the situation prevailing in that country [...] in particular (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who have been the victims of, systematic or generalized violation of their human rights.⁷⁶

This could, conceivably, include persons affected by an environmental disaster, as the two provisions do not expressly preclude it— but, crucially, only in instances of mass influx (it has never yet been triggered). In addition to obligations which may arise under the Directive, several Union member states also have policies by which complementary protection can be granted in relation to environmentally-induced displacement: Sweden’s asylum law, for example, offers shelter to those who cannot return on account of a natural disaster.⁷⁷ The Finish *Aliens Act* provides for asylum in instances where a person is faced with the

threat of death penalty, torture or other inhuman or treatment or treatment violating human dignity, or if they cannot return [home] because of an armed conflict or environmental disaster.⁷⁸

However, there is some evidence that these provisions cover only situations where a pronounced environmental disaster has occurred, and not calamities of a slow-evolving kind.⁷⁹ McAdam notes that both provisions have also remained untested.⁸⁰ Finally, several countries have, in the past, provided exceptional leave to remain on a discretionary, ad hoc and temporary basis, where a person would otherwise be returned to the aftermath of a natural disaster (e.g., Switzerland, the United Kingdom

⁷⁶ Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, [2001] OJ L212/12, art 2(c).

⁷⁷ *Aliens Act* [Sweden] ch 4, s 2(3).

⁷⁸ *Aliens Act* [Finland] s 55; see also s 109 (regarding temporary protection in cases of mass displacement).

⁷⁹ Vikram Kolmannskog and Finn Myrstad, ‘Environmental Displacement in European Asylum Law’ (2009) 11 *European Journal of Migration and Law* 313.

⁸⁰ McAdam, above n 64, 39.

and Canada suspended returns of certain nationals after the 2004 Boxing Day Indian Ocean tsunami).⁸¹

To conclude, complementary and discretionary protection, though very necessary additions to Convention protections available to displaced persons, are hampered by being ill-delineated, sometimes ad hoc, sometimes subject to discretionary decision-making, usually relevant only in the context of non-return and, importantly, relevant usually only in the context of extreme disasters. Their applicability to the climate change context is therefore limited.

6. Internal Displacement?

Non-return is usually relevant and applicable only to those who find themselves in a host country. Climate change, however, may well contribute to an on-going trend: displacees, more often than not, do not move across international borders. UNHCR, for example, in its 2012 Yearbook noted, amongst a total population of concern of 35.8 million, 10.5 million refugees but 17.7 million internally displaced persons (IDPs).⁸² International norms pertaining to the internally displaced have therefore also been scrutinised in the climate change displacement context. The possible relevance of several rights-based instruments have been noted: in particular, the 1998 UN *Guiding Principles on Internal Displacement*,⁸³ the 2006 *Protocol on the Protection and Assistance to Internally Displaced Persons*⁸⁴ and the 2009 African Union *Convention for the Protection and Assistance of Internally Displaced Persons*

⁸¹ See, eg., Martin, above n 73, 4.

⁸² See Office of the United Nations High Commissioner for Refugees, *Statistical Yearbook 2012* (2013) 6; figures for 2013 were not available at the time of thesis submission.

⁸³ *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998); henceforth also 'Guiding Principles'.

⁸⁴ *Protocol on the Protection and Assistance to Internally Displaced Persons*, adopted 15 December 2006 (entered into force 21 June 2008); this covers the Great Lakes Region of Africa.

in Africa.⁸⁵ The Guiding Principles, derived from existing human rights and humanitarian law, describe IDPs as ‘persons or groups of persons who have been forced or obliged to flee or to leave their home or places of habitual residence, in particular as a result of or in order to avoid the effects of [...] natural or human-made disasters, and who have not crossed an internationally recognized State border’.⁸⁶ This allows for protection in relation to movement that results from both human-made and natural disasters,⁸⁷ not the case with the two regional refugee instruments outlined earlier, in relation to movement that is in response to rapid-onset events, movement that results from the slow loss of human habitats and movement which is in response to violence stemming from climatic change, resource scarcity or disasters.⁸⁸ Importantly, the Guiding Principles and other IDP instruments leave little doubt that IDPs are entitled to the same degree of human rights protection as is the general population, and in all stages of displacement.⁸⁹

There can be no doubt that instruments on IDP protection are very important in the climate change displacement context: they are very relevant in that they concern a type of movement which is expected to be prevalent in that context – within country – and they afford protection to persons who move in response to a greater array of drivers than other instruments (e.g. the 1951 Refugee Convention). In the domestic context, the Guiding Principles (or at least parts of it) have been incorporated into domestic law: in 2000, Angola, for example, incorporated the Principles in resettlement law. In Peru, Congress also passed a law based on the

⁸⁵ *Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, adopted 23 October 2009, 49 ILM 86 (entered into force 6 December 2012); also known as the ‘Kampala Convention’.

⁸⁶ Introduction, para 2. The two other aforementioned instruments revolve around the same definition.

⁸⁷ See Kälin, above n 20, 87.

⁸⁸ Ibid, 92f.

⁸⁹ Ibid. They remain citizens, after all, and are therefore afforded the rights that are afforded citizens.

Principles in 2004.⁹⁰ And they appear widely in the resolutions, recommendations, statements or reports emanating from international organisations or bodies.⁹¹ The Kampala Convention, on the other hand, has (December 2012) entered into force and is now creating legal obligations upon a considerable number of regional states parties. And yet, although there is much promise in IDP protection instruments, it is also important to remember that the Kampala Convention is not a global instrument and binds only certain states. The Guiding Principles, on the other hand, are not binding at all, though their normative importance rises with each instance of domestic application or incorporation in international documents and instruments. Nevertheless, as human rights-based norms they face another particular challenge noted by Stephen Humphreys in relation to human rights provisions more generally: it is precisely in emergency situations (including droughts, disasters, etc.) where human rights are easily curtailed, with both domestic and international human rights instruments supporting the notion that derogation from human rights norms, even binding ones, is permitted (at least temporarily) during emergencies.⁹²

7. Human Rights and Extra-Territoriality?

Continuing with human rights, it has been noted that climate change may impact negatively upon the enjoyment of many human rights, especially those of a socio-

⁹⁰ Internal Displacement Monitoring Centre, *Response to the Principles* <[http://www.internal-displacement.org/8025708F004D404D/\(httpPages\)/168DF53B7A5D0A8C802570F800518B64?OpenDocument](http://www.internal-displacement.org/8025708F004D404D/(httpPages)/168DF53B7A5D0A8C802570F800518B64?OpenDocument)>. Also, Nina Schrepfer, 'Addressing Internal Displacement through National Laws and Policies: A Plea for a Promising Means of Protection' (2012) 24 *International Journal of Refugee Law* 667.

⁹¹ Internal Displacement Monitoring Centre, above n 90. For an example see 'Resolution Adopted by the Human Rights Council: Human Rights of Internally Displaced Persons' (2012) 24 *International Journal of Refugee Law* 879.

⁹² See, eg, Stephen Humphreys, 'Introduction' in Stephen Humphreys (ed), *Human Rights and Climate Change* (Cambridge University Press, 2010) 1, 6.

economic nature.⁹³ Where such rights are violated, displacement may occur, which raises further human rights implications. Human rights norms and instruments, such as the Guiding Principles, may play an important part in countering at least some of the consequences of such situations.⁹⁴ However, the fact that certain communities may face greater struggles with rights protection or provision in the face of climate change, in particular in areas already challenged to ensure enjoyment of many basic human rights, has also been indicated.⁹⁵ In light of such inequities, and aligning more closely with the questions of justice and of responsibility at the heart of this thesis, have been those who have asked whether climate change presents opportunities to view the source or origin of any ensuing rights violations, and therefore responsibility for their rectification, as located elsewhere, that is, across borders.⁹⁶ Fundamentally, the answer to this question is negative, certainly in legal terms. Human rights remain remarkably bound to the domestic context.⁹⁷ The noted political philosopher Giorgio Agamben, drawing on Hannah Arendt, has observed:

In the system of the Nation-State, the so-called sacred and inalienable human rights are revealed to be without any protection precisely when it is no longer possible to conceive of them as rights of the citizen of a State.⁹⁸

There are, of course, some extra-territorial responsibilities that bind states in relation to human rights, particularly in two circumstances:⁹⁹ in instances where states

⁹³ Ibid, 1.

⁹⁴ See, eg, Roger Zetter, 'Protecting People Displaced by Climate Change: Some Conceptual Challenges' in McAdam, above n 3, 131, 135; also McAdam and Saul, above n 13.

⁹⁵ Humphreys, above n 90, 1.

⁹⁶ See, eg, John H Knox, *Climate Change and Human Rights* (BePress, 2009) and McAdam and Saul, above n 13.

⁹⁷ Giorgio Agamben, 'Beyond Human Rights' in Paolo Virno and Michael Hardt (eds), *Radical Thought in Italy: A Potential Politics* (University of Minnesota Press, 1996) 162; also Knox, above n 96.

⁹⁸ Ibid; connecting Agamben to 'climate refugees' is Angela Oels, 'Asylum Rights for Climate Refugees? From Agamben's Bare Life to the Autonomy of Migration' (Paper Presented at the Annual Convention of the International Studies Association, San Francisco, 26 March 2008).

⁹⁹ For an analysis engaging with the limited applicability of extraterritoriality in relation to social, economic rights and cultural rights see, eg, Fons Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic and Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 1;

exercise ‘effective control’, or in relation to the activities of private actors over whom they exercise jurisdiction.¹⁰⁰ In *Saldano v Argentina*, the Inter-American Commission on Human Rights held that it

does not believe [...] the term “jurisdiction” in the sense of Article 1(1) is limited to, or merely coextensive with, national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory.¹⁰¹

Nevertheless, human rights remain largely tied to national territory or jurisdiction and the ‘circumstances’ alluded to by the Commission, or in relevant case law, do not really apply to those arising in relation to climate change or states’ and other entities’ greenhouse gas emissions.

Nonetheless, in light of the extra-territoriality principles the Commission has established,¹⁰² the Inuit Circumpolar Council, a non-governmental organisation representing 160,000 Inuit people of Alaska (extraterritoriality not an issues) and Canada, Greenland and Russia (extra-territoriality an issue) and tasked, amongst other things, with the promotion of human rights for Inuit people,¹⁰³ in 2005 requested a declaration from the Commission that the United States, at the time the largest national greenhouse gas emitter in the world, was responsible for degrading their environment and livelihoods bases through their emissions, thereby diminishing opportunities to practice a way of live which Inuit peoples had adhered to for

also Matthew Craven, ‘The Violence of Dispossession: Extra-Territoriality and Economic, Social and Cultural Rights’, in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2009).

¹⁰⁰ See, eg, *Lopez Burgos v Uruguay* [1979] HRC Comm, No R12/52.

¹⁰¹ *Saldano v Argentinian* [1998] Inter-Am CHR, Rep No 38/99, OEA/Ser.L/V/II.95, Doc 7 rev at 289, para 17; echoed, eg, in *Coard and Others v United States* (US Military Intervention in Grenada) [1999] Inter-Am CHR, Rep No 109/99, Case No 10.951, para 37: ‘Under certain circumstances the exercise of its jurisdiction over acts with an extra-territorial locus will not only be consistent with but required by the norms which pertain.’

¹⁰² And other bodies; see, eg, the European Court of Human Rights (ECHR) in *Loizidou v Turkey* [1998] Eur Court HR, No 40/1993/435/514.

¹⁰³ See Inuit Circumpolar Council, *About ICC* (2013) <<http://inuit.org/en/about-icc.html>>.

centuries.¹⁰⁴ They argued that the United States, more than any other country, was responsible for emission levels which violated a host of socio-economic and indigenous rights.

The request was unsuccessful: in a 2006 letter, the Commission declared that it ‘will not be able to process your petition at present [...]. [T]he information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration.’¹⁰⁵ According to Timo Koivurova et al, this highlights just how difficult it may be to derive ‘effective protection’ from the detrimental impacts of climate change via ‘traditional rights mechanisms’,¹⁰⁶ aggravated by what Humphreys notes to be a general absence of strong international enforcement institutions and mechanisms, especially where the enforcement of social, economic and indigenous rights are concerned.¹⁰⁷ Mary Robinson, former United Nations High Commissioner for Human Rights, has nevertheless appealed that, despite such obstacles, human rights law and institutions

¹⁰⁴ *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (7 December 2005) <http://www.earthjustice.org/library/legal_docs/petition-to-the-interamerican-commission-on-human-rights-onbehalf-of-the-inuit-circumpolar-conference.pdf>. For a more detailed analysis providing the relevant background to the case, see Donald Goldberg and Martin Wagner, *Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System* (2002) <http://www.ciel.org/Publications/PetitioningGlobalWarming_IAHR.pdf> and Joanna Harrington, ‘Climate Change, Human Rights, and the Right to be Cold’ (2007) 18 *Fordham Environmental Law Review* 513 and Timo Koivurova, Eva C H Keskitalo and Nigel Banks, *Climate Governance in the Arctic* (Springer, 2009) 210ff. Note also that the Office of the High Commissioner for Human Rights (OHCHR) has examined the relationship between climate change and human rights, requested by the Republic of the Maldives, an Indian Ocean island nation often thought to be threatened by sea-level rise; see Office of the High Commissioner for Human Rights, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc A/HRC/10/61 (15 January 2009). Analysing the report is John H Knox, ‘Linking Human Rights and Climate Change at the United Nations’ (2009) 33 *Harvard Environmental Law Review* 477.

¹⁰⁵ Inter-American Commission on Human Rights, ‘Letter of the Inter-American Commission on Human Rights to Mr. Crowley, Ref: *Sheila Watt-Cloutier et al*’ (2006) in Svitlana Kravchenko, ‘Right to Carbon or Right to Life: Human Rights Approaches to Climate Change’ (2008), 535 <<http://ssrn.com/abstract=1304844>>. Though note that the Commission did schedule a meeting to discuss the issue of human rights and climate change; it was not widely attended; see Earth Justice, Press Release, *Nobel Prize Nominee Testifies About Global Warming* (2007) <<http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html>>.

¹⁰⁶ Koivurova et al, above 104, 219.

¹⁰⁷ See Humphreys, above n 92, 4f. Also Stephen Humphreys, ‘Are Social Rights Compatible with the Rule of Law?’ (Working Paper 10/06, Hauser Global Law, 2006).

must be able to address justice issues raised by climate change, including those raised across borders.¹⁰⁸ Whether this will be the case remains to be seen.

8. Disaster Response, Humanitarian Assistance?

International frameworks concerning disaster management and humanitarian assistance and relief have provided a final key avenue through which responding to climate change and displacement has been conceptualised in the disciplinary scholarship.¹⁰⁹ An increase in the occurrence of natural disasters in recent decades, and their possible displacement consequences, has already been noted in the previous chapter. John Holmes, former United Nations Under-Secretary-General for Humanitarian Affairs, described this trend (more frequent and severe disasters) as a ‘curtain raiser on the future’ in 2008.¹¹⁰ In this context, the International Law Commission (ILC) began working on the drafting of articles concerning the Protection of Persons in the Event of Disasters in 2007,¹¹¹ whereby it acknowledges that ‘[d]isasters affect large numbers of individuals each year’, ‘which has given rise to the need for enhanced legal regulation’ and makes the protection of such persons a ‘necessary component for a complete international disaster relief regime’.¹¹² The Draft Articles’ aim is to ‘facilitate an adequate and effective response to disasters that meets the essential needs of the persons concerned, with full respect of their

¹⁰⁸ Mary Robinson, ‘Foreword’ in Humphreys, above n 92, xvii.

¹⁰⁹ See, eg, Michelle Leighton, ‘Climate Change and Migration: Key Issues for Legal Protection of Migrants and Displaced Persons’ (German Marshall Fund of the United States, 2010); McAdam, above n 59, esp. 46ff; Sarah Collinson, ‘Developing Adequate Humanitarian Responses’ (German Marshall Fund of the United States, 2010).

¹¹⁰ John Holmes, ‘The Need for Collaboration’ (2008) 31 *Forced Migration* 4, 4.

¹¹¹ See International Law Commission, *Protection of Persons in the Event of Disasters* (2012) <http://untreaty.un.org/ilc/guide/6_3.htm>.

¹¹² International Law Commission, ‘Protection of Persons in the Event of Disasters: Memorandum by the Secretariat’, UN Doc A/CN.4/590 (11 December 2007) 1, 3.

rights'.¹¹³ Crucially, a duty to cooperate interstate is enunciated in Draft Article 5.¹¹⁴ However, eligible events include only those of a 'calamitous' nature,¹¹⁵ and although 'persons concerned' could also refer to displacees, displacement is nowhere explicitly mentioned.¹¹⁶

The 2005 Hyogo Framework for Action¹¹⁷ has also been noted as a possibly relevant instrument in the climate change displacement context.¹¹⁸ It is an amalgamation of pre-existing instruments concerning disaster risk and response.¹¹⁹ It stipulates that 'developing countries, especially least developed countries, warrant particular attention, in view of their higher vulnerability levels, which often exceeds their own capacity to respond to and recover from disasters' and therefore encourages 'enhance[d] international and regional cooperation and assistance'.¹²⁰ Importantly, in the context of climate change displacement, it asks that governments ensure that where measures are taken to assist displaced persons, that these do not further intensify risks and vulnerabilities.¹²¹ Michelle Leighton notes that cooperation duties stipulated could include that states provide assistance also to disaster victims that have crossed an international border – at least temporarily.¹²²

¹¹³ International Law Commission, 'Protection of Persons in the Event of Disasters: Texts of Draft Articles 1, 2, 3, 4, 5 as Provisionally Adopted by Drafting Committee', UN Doc A/CN.4/L.758 (24 July 2009) art 2.

¹¹⁴ The draft article stipulates that '[f]or the purposes of the present draft articles, cooperation includes humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.' See International Law Commission, 'Protection of Persons in the Event of Disasters: Texts and Titles of Draft Articles 5 *bis*, 12, 13, 14 and 15, Provisionally Adopted by the Drafting Committee from 5 to 11 July 2012', UN Doc A/CN.4/L.812 (12 July 2012).

¹¹⁵ International Law Commission, above n 113, art 3.

¹¹⁶ See McAdam, above n 64, 47.

¹¹⁷ *Hyogo Framework for Action 2005 - 2015: Building the Resilience of Nations and Communities to Disaster* (Extract from the Final Report of the World Conference on Disaster Risk Reduction), UN Doc A/CONF.206/6 (16 March 2005); henceforth also 'Hyogo Framework' or 'Framework' as appropriate.

¹¹⁸ See, eg, Leighton, above n 109.

¹¹⁹ *Ibid*, 2.

¹²⁰ Hyogo Framework, para 13(g) and 13(h).

¹²¹ Hyogo Frameworks, para 19(ii)(i).

¹²² Leighton, above n 109, 3.

The principles espoused by the Framework are further incorporated, for example, in the 2006 Operational Guidelines on Human Rights and Natural Disaster adopted by the Inter-Agency Standing Committee (IASC)¹²³ and the International Committee of the Red Cross's (ICRC) Guidelines on Disaster Relief and Disaster Recovery Assistance.¹²⁴ The cooperation norms in the Framework, finally, echo human rights norms, including in relation to international assistance to displaced.¹²⁵

Despite the promise of these developments, however, emerging norms on humanitarian relief and disaster response remain poorly delineated and limited in the scope of protection and assistance they can provide, shortcomings acknowledged by those who have explored their relevance to migration or displacement in the climate change context: First, most relevant norms are voluntary, no more than soft law, leaving those who may have to move at the whims of political expediency,¹²⁶ and possibly at the mercy of acts not subject to 'legal rules but the logic of situations' which are easily deployed 'to legitimate a range of dubious practices'.¹²⁷ Secondly, already the humanitarian and disaster relief system is ill-equipped to cope with present volumes of people displaced or otherwise vulnerable, largely a result of '[d]istortions in the relative levels of donor assistance flowing to different countries due to competing political and strategic considerations'.¹²⁸ Thirdly, humanitarian relief for displaced persons is overbearingly concentrated on providing (short-term)

¹²³ Inter-Agency Standing Committee, 'Protecting Persons Affected by Natural Disasters: IASC Operations Guidelines on Human Rights and Natural Disasters' (Brookings-Bern Project on Internal Displacement, 2006) <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=IASC&type=THEM_GUIDE&coi=&docid=4a54bbcf&skip=0>.

¹²⁴ International Committee of the Red Cross, *Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Disaster Recovery Assistance* (2007) <<http://ocha.unog.ch/drptoolkit/PreparednessTools/IL%20Frameworks/IDRL%20guidelines%20-%20en.pdf>>; also Leighton, above n 109, 3 for these two.

¹²⁵ Leighton, above n 109, 3. More on this also in ch 8 of this thesis.

¹²⁶ Ibid, 7.

¹²⁷ Chimni, above n 31, 3. Both Bhupinder Chimni and Giorgio Agamben have persuasively argued that humanitarian actors or actions do not always foster human welfare; see Chimni, Ibid and Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998) 13.

¹²⁸ Collinson, above n 109, 4.

‘material relief’ which often ignores the long-term needs of affected persons,¹²⁹ including those who may have moved from areas that have become permanently uninhabitable. Finally, and a similar dynamic has already been highlighted in relation to many of the other instruments and provisions investigated, relief for those facing slow-onset change, is not seen as compelling compared to those facing the aftermath of sudden, high-impact events.¹³⁰

9. Response or Responsibility?

The disciplinary enquiry concerning displacement in the climate change context has, importantly, focused on how international law is relevant if, when and where displacement happens. A plethora of international norms and instruments have been investigated in the process, in an effort to uncover their usefulness in responding to displacement in the climate change context. Many have been found to be relevant to a degree in theory – at least some of those affected may hold some rights, though a response to their plight will more likely be ad hoc and uncertain in practice. Like Kafka’s man from the country, then, who appears in the chapter’s opening quote, affected persons in the climate change displacement context may find themselves tantalised by the Law’s possibilities but may ultimately be largely deserted by it.¹³¹

Focusing on how to respond to displacement in the climate change context has meant that the discipline has asked important questions about what is possible, uncovering that, certainly where displacement is internal, or where it is in response to significant natural disasters, or where it is in response to the total loss of living

¹²⁹ Ibid.

¹³⁰ Leighton, above n 109, 8.

¹³¹ See Agamben, above n 127, 50.

spaces the law does raise some possibilities. What is asked more rarely, however, is what is right. Current climate change is not a random phenomenon; it is anthropogenic, man-made. Although it is true that climate change impacts will not compel displacement in isolation of other factors, there is no question of their contribution to displacement. It is right and necessary, therefore, to ask of the law not only how it may help to ensure that displacement is properly responded to, but also whether and how questions of responsibility are engaged. Rather than the response-focused framework which has dominated the disciplinary interrogation, this thesis will therefore employ a justice-based framework, at the heart of which will be questions concerning responsibility.

10. Conclusion

The present chapter has sought to present the key findings which have emerged from the disciplinary outputs concerning climate change and displacement. A lot of territory has been covered: multiple legal frameworks have been applied to the many manifestations of displacement in the climate change context. A somewhat fragmented picture of international law's relevance is thereby beginning to emerge, within an overall frame which seeks to find solutions for how to deal with displacement where it occurs. Although treaty-based protection seems unlikely (certainly for the foreseeable future), several other mechanisms may well be relevant. These will certainly not capture all those affected, but they may capture a share, especially where people move without crossing borders (the internally displaced), where they move in certain regions (whether crossing borders or not; for example, in Africa), or where they move in response to highly visible natural

disasters of catastrophic proportions. The thesis from here on will proceed by applying a different lens, asking how the law is relevant if one views displacement in the climate change context as an issue of responsibility instead – in particular, for harm, loss or disproportionate disadvantage and burden. Giving structure to this approach will be the application of justice theory, in particular that pertaining to corrective and distributive justice. The picture which will emerge from this endeavour may also be fractured (not provide ‘a single, triumphant truth’¹³²) but will contribute to the overall question of what to do about displacement in the climate change context in meaningful ways. The next chapter presents the justice framework which will underpin analysis throughout the remaining chapters of the thesis.

¹³² Hilary Charlesworth, ‘Feminist Methods in International Law’ (1999) 93 *American Journal of International Law* 379, 379.

CHAPTER 4

Why Justice? What Justice?

*Whatever its shortcomings, international law also exists as a promise of justice.*¹
(Martti Koskenniemi, 2003)

*Now is the time for international lawyers to focus on issues of fairness in the law. The new maturity and complexity of the system calls out for a critique of law's content and consequences.*²
(Thomas Franck, 1995)

1. Introduction

The thesis has so far introduced the topic of climate change and human displacement and its treatment in the international law scholarship. The goal of this thesis, however, is more specific – to uncover whether a justice-based analysis can assist in illuminating the role and relevance of international law in relation to climate change and human displacement in ways which are novel. Undoubtedly, this necessitates at least a brief discussion of ‘what is justice?’ This is, of course, easily conceived not only as the subject of a lengthy separate dissertation but is a question which has underpinned millennia of philosophical and academic debate. An in-depth analysis of the concept is therefore beyond the scope and purposes of this chapter and the thesis. What is beyond doubt, however, is that justice matters, or should matter, in human interactions. The American political philosopher John Rawls, for example, held that ‘[j]ustice is the *first* virtue of social institutions’ and ‘[b]eing *first* virtues of human activities, truth and justice are uncompromising.’³ One dictionary definition of the

¹ Martti Koskenniemi, ‘What is International Law For?’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 2003) 57, 57.

² Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 9.

³ John Rawls, *A Theory of Justice* (Harvard University Press, revised ed, 1999) 3, 4 [italics added by thesis author].

concept stipulates that justice is about ‘just behaviour or treatment’, including ‘the quality of being fair and reasonable’, also in ‘the administration of the law or authority in maintaining this’,⁴ which indicates a construction of justice as fair process. Otherwise, justice has often been described as the ‘constant and perpetual disposition to render every man his due’⁵ (usually understood in relation to human interactions or relations and their consequences), which appears to emphasise just outcomes. The basic tension or relationships between the two, process and outcome, is one which continues to stimulate debate. Some have emphasised that justice is really about both simultaneously. Terry Nardin, for example, holds that justice ‘involves the idea of impartial rules as well as that of the impartial application of rules.’⁶ More basically, Samuel Fleischacker considers justice ‘a virtue that protects individuals’ – from harm and interference with their belongings, rights or freedoms.⁷ The goal of justice is therefore to counter a range of possible ills or wrongs (many more will find mention in the pages of this and later chapters) which can befall people, or groups of people, especially in their interactions with others. Given the array of ills or wrongs it is meant to have the potential to alleviate, it is perhaps unsurprising that ‘justice’ is not singular. Rather, a sometimes bewildering range of justice paradigms or conceptualisations have emerged over the centuries which seek to address different situations and relationships.⁸ Amongst these, corrective and distributive justice, the foci of this thesis, stand out.

⁴ Oxford Dictionaries, *Justice* (2012) <<http://oxforddictionaries.com/definition/english/justice>>.

⁵ The Law Dictionary, *Justice* (2012) <<http://thelawdictionary.org/justice-n/>>. A similar notion is expressed also in Plato, *The Republic* [trans. Benjamin Jowett (ebook@Adelaide, 2012)] 331e; there, Polemarchus claims that justice is about restoring to every man what is his due.

⁶ Terry Nardin, *Law, Morality and the Relations of States* (Princeton University Press, 1983) 258.

⁷ Samuel Fleischacker, *A Short History of Distributive Justice* (Harvard University Press, 2004) 6.

⁸ To name just a few: corrective justice, distributive justice, retributive justice, participatory justice, social justice, communitarian justice, cosmopolitan justice, global justice, etc. Admittedly, many of those just mentioned may fall under the larger distributive justice umbrella, so participatory justice is about the just distribution of participation in public fora, etc.

Subsequent sections of this chapter will delve deeper into the two justice paradigms chosen as the reference points for this research. However, the following section will first engage in more depth with the question of justice as the framework for this thesis, justifying the overall justice approach and the two particular justice angles chosen. This will be followed by a section which briefly engages with the ‘promise of justice’ in international law that was alleged in the opening quote of this chapter. Section Four will explore the Aristotelian origin of the corrective/distributive justice dichotomy and how it has been interpreted over time. Sections Five and Six will delve deeper into each justice paradigm individually, seeking to tease out key points – of both contention and agreement. The chapter will conclude with indications of how the justice framework presented in this chapter is relevant to the analysis to follow in subsequent chapters.

2. Why Justice? What Justice?

Like the idea of human rights, justice is understood to be of universal importance and value.⁹ Beyond this, Tom Campbell has argued that significant disagreement exists as to its nature and scope:¹⁰ Is it a negative virtue which stipulates how people should *not* treat each other, or does it demand more proactive action to find implementation? Does it concern interactions, and their consequences, only between individuals, or also those between any interacting parties? Does it reach across borders?¹¹ Is it linked with other normative systems – for example, law – or

⁹ See, eg, Tom Campbell, *Justice* (Palgrave Macmillan, 3rd ed, 2010) 1.

¹⁰ *Ibid*, 7ff.

¹¹ See, eg, Thomas Nagh, ‘The Problem of Global Justice’ (2005) 33 *Philosophy and Public Affairs* 113 and Andrew Linklater, ‘The Evolving Spheres of International Justice’ (1999) 75 *International*

independent? Is it rhetoric or something more? In other words, justice evokes immense complexity which easily defies all claims to its alleged universality and which confounds justice-based analyses.¹² Nevertheless, as Campbell states:

In the absence of the naïve belief that there is a ‘true’ or ‘correct’ meaning of ‘justice’, we [can] proceed by elucidating the actual deployment of the language of justice in all its variety to the point where stipulative choices [can] be made in order to arrive at a clear and coherent set of conceptual distinctions which point up the nature of the [...] questions which are at issue in the contemporary world. There may be no one correct analysis of justice but there are certainly more or less useful ones.¹³

He points out that the key to justice having utility as an analytical tool is to recognise the ‘differing and competing moral views’ which coexist under the overall *concept* of ‘justice’, but which actually underpin differing *conceptions* of ‘justice’.¹⁴ It is the latter – ‘conceptions’ – which should provide the ‘evaluative criteria’ to be applied in justice-based analyses, as only they can offer a useful and targeted framework that avoids the application of overly vague or broad principles and perspectives.¹⁵

The distinction between the ‘concept’ of justice and ‘conceptions’ of justice this raises is important for this thesis. An analysis of the role of international law in relation to climate change and human displacement in light of justice (the task of this thesis) under the ‘concept’ umbrella would undoubtedly turn out to be so broad-brush as to be methodologically and practically nearly useless. However, a focus on particular ‘conceptions’ of justice may permit a more targeted, contextualised and bounded analysis. But why focus on corrective and distributive justice ‘conceptions’? Why not others? The answer to this is manifold but does go back, most simply, to what justice, as an overall ‘concept’, is. As stated in the chapter introduction, justice is fundamentally (and vaguely) about rendering each party its due in relation to

Affairs 473 and Duncan French, ‘Global Justice and the (Ir)relevance of Indeterminacy’ (2009) 8 *Chinese Journal of International Law* 593.

¹² Campbell, above n 9, 13.

¹³ *Ibid.*, 13.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

human interactions and their consequences. This evokes an immense complexity. What a corrective/distributive justice framework permits is to reduce this complexity to just two considerations: the injustice of having one party not rendered its due because something has unjustly been taken from it and the injustice of having one party not rendered its due because something owed to it has not been granted or shared. Even though this may or may not represent an exclusive way of looking at what may be owed in relation to the consequences of human interactions, in the words of Ernest Weinrib, it represents ‘a comprehensive and fundamental mode[...] of ordering external relationships’.¹⁶ It essentialises them to, arguably, their most ‘mutually irreducible forms’ and their ‘barest and most inclusive abstractions’.¹⁷

What, more specifically, is involved in either justice ‘conception’? Both are undoubtedly concerned with the same outcome or goal – equalisation (and thereby justice; the rendering of what is due) between different parties.¹⁸ Weinrib argues that ‘[d]istributive justice divides a benefit or burden [equally] in accordance with some criterion. An exercise of distributive justice consists of three elements: the benefit or burden being distributed,¹⁹ the [parties] among whom it is distributed, and the criterion according to which it is distributed.’ Corrective justice, on the other hand, ‘features an equality of quantities. It focuses on a quantity that represents what rightfully belongs to one party but is now wrongly possessed by another party [or has been taken] and therefore must be shifted back to its rightful owner.’²⁰

Ultimately, then, a corrective/distributive justice framework permits a comprehensive, yet targeted and coherent investigation of justice and of responsibilities which arise in relation to human interactions and their consequences,

¹⁶ Ernest J Weinrib, ‘Corrective Justice’ (1992) 77 *Iowa Law Review* 403, 416.

¹⁷ Ibid.

¹⁸ Ibid, 404f and throughout.

¹⁹ Ibid, 408

²⁰ Ibid.

an angle almost completely ignored in analysis (including legal) of climate change and human displacement, although it is undeniably worthy of discussion, as this thesis will seek to do. In particular, corrective justice will permit analysis of the climate change and human displacement phenomenon as arising from interactions which are unequal (therefore unjust) because the actions of some contribute to taking what rightfully belongs to others, for example, livelihoods, property, home, personal security or well-being. Distributive justice, on the other hand, will permit analysis of the climate change and human displacement phenomenon as arising from interactions which are unequal (therefore unjust) because the actions of some contribute to creating burdens for others, with the distribution of burdens and benefits that arise from processes that create such burdens unequally distributed or shared.

But is justice connected to law? Is it 'part of law or [...] simply a moral judgement about law', which is sometimes understood as 'officially promulgated rules of conduct, backed by sanctions for their transgression?'²¹ Arguably, international law is about more than just 'rules'. Rather, according to Rosalyn Higgins, it is about 'the entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules".'²² But the question about the connection between law and justice remains. It is as puzzling and long-standing as the question about what justice is, yet is vital to the context of this thesis, whose task it is to position a particular phenomenon at the intersection of both law and justice. Legal positivists often argue against a connection between the two, usually citing a

²¹ Anthony D'Amato, 'On the Connection Between Law and Justice' (Faculty Working Paper, Northwestern University School of Law, 2011) 2, 4.

²² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995) 2, 3.

lack of ‘objective criteria’ by which to evaluate or implement the latter as cause for concern.²³ Positivist Hans Kelsen, for example, famously stipulated

There is not, and cannot be, an objective criterion of justice because the statement: something is just or unjust, is a judgment of value referring to an ultimate end, and these value judgments are by their very nature subjective in character, because based on emotional elements of our mind, on our feelings and wishes. They cannot be verified by fact, as can statements about reality [...]. This is the reason why in spite of the attempts made by the most illustrious thinkers of mankind to solve the problem of justice, there is not only no agreement but the most passionate antagonism in answering the question of what is just.²⁴

For this reason, positivists persistently argue against linking justice with law.²⁵ More specifically, Kelsen notes the corrective/distributive justice framework as developed by Aristotle as lacking a specific ‘mechanism for determining what is each person’s due’, as a ‘tautology devoid of content,’²⁶ and therefore of limited use to law or legal application. However, Weinrib has countered this by stating that the very discovery of the two conceptions was of immense value:

[W]e should first ask whether Aristotle has correctly formulated the problem. For without a correct formulation of the problem, no solution will be adequate; and, conversely the formulation of the problem presumably imposes a certain structure on the solution and is, therefore, the first step in its discovery.²⁷

He concludes, ultimately, that the conceptions can ‘inform legal arrangements’, and have in fact done so, nowhere more so than in modern domestic tort law, which, according to Weinrib, has corrective justice (returning something that has been taken) at its heart.²⁸ In other words, ‘in distinguishing these two forms of justice, Aristotle sets out the justificatory structures to which coherent legal arrangements conform.’²⁹ Justice, therefore, informs law and can *be* law. But what about justice

²³ See, eg, Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) eg, s 3.1 and Weinrib, above n 16.

²⁴ Hans Kelsen, *What is Justice And Justice, Law and Politics in the Mirror of Science* (University of California Press, 1957) 295.

²⁵ Also D’Amator, above n 21, 6.

²⁶ Weinrib, above n 16, 411.

²⁷ *Ibid*, 411.

²⁸ *Ibid*, 418.

²⁹ *Ibid*.

beyond the realm of domestic law? Does it feature as a concern or integral part of international law and scholarship which engages with it? Can it? Should it? The following section will engage with such questions.

3. Justice and International Law: The Scholarly Debate

Scholars of international law have expressed an interest in the relevance of justice to that legal order, although no agreement exists as to what justice means to international law or the extent to which it does or should feature there. Carlo Focarelli has noted the natural law origins of international law, which concerns questions of justice. He argues that '[i]nternational law was actually born out of natural law as understood in the Western philosophical, theological, political, and legal tradition, and continues to be at centre stage in current "global law" projects'.³⁰ Justice matters here because natural law is underpinned by a focus on what is right or wrong and a desire to prevent 'unjust laws' which reflect only the priorities of powerful actors but not the common good (what is the due of all).³¹ Emphasising the connection between natural and international law was also Roman jurist Gaius, who held that 'what natural reason establishes among all men and is observed by all peoples alike, is called the *jus gentium*, as being the *jus* which all nations employ.'³² And yet, international law is implicated in fostering or not preventing great

³⁰ Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press, 2012) 94.

³¹ *Ibid.*, 101f.

³² Gaius, *Institutes* [trans. O F Robinson and W M Gordon, *The Institutes of Gaius* (Duckworth, 2001)] 1,1,1; also Focarelli, above n 30, 95f.

injustices, for example, historically, in relation to the Western-Christian civilising mission and, more contemporarily, in current processes of globalisation.³³

Realists would argue that justice does not belong in international law and relations in the first place. They note that all states do, and perhaps even should do, is pursue self-interest in a system akin to the 'Hobbesian state of nature':³⁴ 'For [...] realists, international politics [...] is a struggle for power, but unlike domestic politics, a struggle dominated by organized violence'.³⁵ They envision a world of state interaction, in other words, in which justice (consideration of what is *another's* due) has no place. In fact, realists would argue that states' pre-occupation with their own interests is preferable to them acting in light of other considerations (i.e. justice, the greater good, etc.), which 'may result in large-scale human disasters, due to a deadly combination of fallibility, ideological bias and hubris'.³⁶ International law, too, in this view is largely irrelevant; 'legalistic-moralistic' at best and 'intolerably invasive' at worst.³⁷

So far, two extreme positions concerning the role of justice in international law (and relations) have been presented: one which holds that international law is strongly imbued with justice considerations, given its alleged natural law origins, and another which denies any role for justice considerations whatsoever. More subtly integrating both of these positions has been a body of international law, influenced by the Critical Legal Studies movement, and usually referred to as NAIL (New Approaches to International Law), which has sought to argue that international law,

³³ See, eg, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); also Focarelli, above n 30, 94.

³⁴ Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundation for International Law* (Oxford University Press, 2003) 30.

³⁵ Robert Keohane and Joseph Nye, *Power and Interdependence* (Addison Wesley Longman, 2nd ed, 2011) 20; in Buchanan, above n 34, 30.

³⁶ Buchanan, above n 43, 36; he relies on Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace* (Alfred A Knopf, 6th ed, 1985).

³⁷ Focarelli, above n 30, 107.

or rather the discourse which concerns it, veers between support for, and denial of, justice's relevance (amongst other normative considerations) in international law. Martti Koskenniemi, in his seminal *From Apology to Utopia*,³⁸ highlights in particular a disciplinary dialogue divided between two states – 'apology' and 'utopia'. That is, apology for international realist tendencies to pursue self-interest, on the one hand, and a utopian state or predisposition which expresses some hope that self-interest may be constrained in the name of morality, justice or some other perceived greater good or normative consideration, on the other hand. All international legal debate, Koskenniemi argues, oscillates between the two, but both 'end up being politics in disguise, either to justify actions taken regardless of law or to promote value-laden goals.'³⁹

From Apology to Utopia 'was to provide resources for the use of international law's professional vocabulary for critical or emancipatory causes',⁴⁰ and many NAIL scholars will highlight that countering global wrongs is at the heart of their project.⁴¹ And yet, according to Nigel Purvis, NAIL 'seems to offer little more than the opportunity to exist as a convincing nay-sayer'.⁴² Certainly, no comprehensive or specific commitment to justice in international law and relations emerges in such a context.

Another scholarly movement, TMAIL (Third World Approaches to International Law), has raised doubts that international law fosters both self-interest *and* a greater good, and has presented a mono-directional system which seemingly always works

³⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Lakimiesliiton Kustannus, 1989).

³⁹ Focarelli, above n 30, 113.

⁴⁰ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2nd ed, 2005) 589.

⁴¹ See, eg, David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 *Wisconsin International Law Journal* 1 and James Boyle, 'Ideals and Things: International Legal Scholarship and the Prisonhouse of Language' (1985) 26 *Harvard International Law Journal* 327.

⁴² Nigel Purvis, 'Critical Legal Studies in Public International Law' (1991) 32 *Harvard International Law Journal* 81, 123

in favour of richer states of the Global North and against poorer states of the Global South. Fundamentally, 'TWAAIL insists on [...] the imperialist structure of international law since the Conquest of the New World. Globalization is routinely seen as a new form of imperialism imposed by Western states.'⁴³ It holds that international law 'help[s] to legitimize and sustain the unequal structures and processes that manifest themselves in the growing north-south divide.'⁴⁴ Given such structural inequities, its goal is 'to transform international law from being a language of oppression to a language of emancipation', and to implement and foster 'truly global justice'.⁴⁵ Yet, despite such noble goals, how to achieve this is often left ill-addressed. Some have therefore described TWAAIL as little more than 'illusory, [...] rhetorically colourful but programmatically vacuous'.⁴⁶ Focarelli argues that 'TWAAIL smuggles for legal what is a political claim'.⁴⁷

Two further scholarly and fairly recent engagements with the question of justice in international law deserve attention: In *Justice, Legitimacy and Self-Determination*,⁴⁸ Allen Buchanan criticises the realist take concerning international law and relations – which emphasises states' pursuit of self-interest. Instead, he argues that international law, 'can and ought to be evaluated from the standpoint of moral principle, including, pre-eminently, principles of justice', justice here being about 'the most basic moral rights and obligations that *persons* have'.⁴⁹ In other words, the object of justice in international law must be the individual. At the

⁴³ Focarelli, above n 30, 130.

⁴⁴ BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community law Review* 3, 3.

⁴⁵ A Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' (2003) 77 *Chinese Journal of International Law* 77, 79; in Focarelli, above n 30, 130.

⁴⁶ Brad Roth, 'Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii' (2000) 98 *Michigan Law Review* 2056, 2057.

⁴⁷ Focarelli, above n 30, 131.

⁴⁸ Buchanan, above n 34.

⁴⁹ *Ibid*, 1-2 [italics by thesis author].

moment, the international legal order fails individuals. It is 'inadequate to the task of coping with secession crises, ethnic conflicts, failed states, and global terrorism',⁵⁰ and a range of other ills that also have consequences for individuals. As a solution, Buchanan makes 'principled proposals for reform', in particular, the limiting of state sovereignty in relation to human rights.⁵¹ Justice, in other words, is about removing barriers to achieving *human* rights.

Thomas Franck, in *Fairness in International Law and Institutions*, argues that because there can no longer be a question as to whether 'international law is law', 'international lawyers are now free to undertake a critical assessment of its content', which should include debate as to whether international law is legitimate and fair.⁵² Fairness, he argues, will depend in particular on two considerations – the simultaneous application of both procedural and distributive justice:

The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.⁵³

Unlike many others who engage with international law and the question of justice, Franck thereby ties his analysis to particular 'conceptions' of justice. Returning to Campbell's argument about the 'concept' of justice versus 'conceptions' of justice, this is important. Many agree that international law has 'a symbolic, as well as a regulative function',⁵⁴ is both utopian and apologetic, fosters, or aspires to self-interest as well as justice, or a greater good. Others (i.e. TWAILers, Buchanan) feel that justice is fundamentally lacking in the international law world, but have made

⁵⁰ Ibid, 15.

⁵¹ Ibid, 430. A changing position of the individual under international law has been noted for some time, however. See, eg, Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 *Utah Law Review* 1.

⁵² Franck, above n 2, 6f.

⁵³ Ibid, 7.

⁵⁴ Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 39 *American Journal of International Law* 379, 393.

contributions as to how it could and should be imbued with ‘justice’. However, with the exception of Franck, much of the international law scholarship that engages with questions of justice in that legal order ignore particular ‘conceptions’ of justice and instead conceive of justice as conceptually vague. Terry Nardin, however, has stated that ‘[a]rguing about justice [should] force one to articulate and clarify the standards on which one’s judgements are based.’⁵⁵ This, then, is precisely the task set by this thesis: to take one global phenomenon – climate change and displacement – and evaluate its possible treatment in and through international law in relation to the standards or features involved in two particular justice paradigms or ‘conceptions’ – corrective and distributive justice. The chapter will now turn to the philosophical origins of both conceptions and then detail the features of each in greater detail.

4. Two Theories of Justice: Origins

Although leaning on others,⁵⁶ it is Aristotle who is thought to have developed the corrective/distributive justice dichotomy which will inform this thesis.⁵⁷ To understand the Aristotelian distinction between the two constructs, it is important to understand a more fundamental justice distinction made by Aristotle – that between universal, that is higher or divine justice, and particular justice, that is justice which concerns particular human interactions.⁵⁸ It is within particular justice where

⁵⁵ Nardin, above n 6, 257.

⁵⁶ For example, Plato; see Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press, 2009) 6.

⁵⁷ See, eg, Ibid, 1, 6; also Benjamin Zipursky, ‘Philosophy of Tort Law’ in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing, 2004) 122, 133.

⁵⁸ Englard, above n 56, xi, 1f.

Aristotle then positions the distinction between distributive and corrective justice.⁵⁹

According to Aristotle:

Particular justice on the other hand, and that which is just in the sense corresponding to it, is divided into two kinds. One kind is exercised in the distribution of honour, wealth, and the other divisible assets of the community, which may be allotted among members in equal or unequal shares. The other kind is that which supplies a corrective principle [...].⁶⁰

More specifically concerning distributive justice, he stipulates:

It follows therefore that [distributive] justice involves at least four terms, namely, two persons for whom it is just and two shares which are just. And there will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal equal shares, that quarrels and complaints arise. This is also clear from the principle of 'assignment by desert'. All are agreed that justice in distribution must be based on desert of some sort, although they do not mean the same sort of desert; democrats make the criterion free birth, those of oligarchical sympathies wealth or in other cases birth [...].⁶¹

Concerning corrective justice, he stipulates:

This justice is of a different sort from the preceding. For justice in distributing common property always conforms with the proportion we have described since when a distribution is made from the common stock, it will follow the same ratio as that between amounts which the several persons have contributed to the common stock; and the injustice opposed to justice of this kind is a violation of this proportion. But the just in private transactions, although it is equal in a sense (and the unjust the unequal) is not the equal according to geometrical but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad one a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only at the nature of the damage, treating the parties as equal, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other sustained damage. [...] [T]he judge endeavours to make them equal by the penalty or loss he imposes, taking away the gain.⁶²

Significant similarities and distinctions emerge: As has been noted before, both types of justice are pre-occupied with the idea that equality is created, or rather re-created, between separate entities. In corrective justice, this concerns the equality between the doer and sufferer of harm or damage, with the relationship between the two to be equalised through the imposition of a penalty, usually compensation. Distributive

⁵⁹ Ibid, 2.

⁶⁰ Aristotle, *Nicomachean Ethics* [trans. H Rackham (Harvard University Press, 1962)] 267.

⁶¹ Ibid, 271-273.

⁶² Ibid, 273-275.

justice, on the other hand, concerns the equality that should exist between deserving entities and the things that ought to be shared amongst them (usually broadly conceived to be benefits but also burdens⁶³) – in proportion to desert. The following table will further illuminate similarities and differences:

Table 1: Corrective Justice vs Distributive Justice

	Corrective Justice	Distributive Justice
Parties	<ul style="list-style-type: none">Victim/VictimiserLoss Bearer/Perpetrator (this – a specific perpetrator/victimiser – matters to Aristotle and those corrective justice theorists that follow in his footsteps, but less so to others, as a later section of this chapter will show)	<ul style="list-style-type: none">Haves/Have-NotsPossibly enjoined in some communal sense through which desert is assessed (this matters to Aristotle, but increasingly less so in later constructions of distributive justice, as a later section of the chapter will show)
Point of Contention	<ul style="list-style-type: none">Damage, Harm, Injury, Loss, Fault (again, the latter matters more to some more than others, as the chapter will show)	<ul style="list-style-type: none">Sharing of Benefits (and Burdens)Access off or Denial to BenefitsProportionalityDesert / Merit (this features strongly in the Aristotelian construction and those that flow from it and less in at least some contemporary constructions of distributive justice, where desert may arise simply from being human or disadvantaged, for example)
Goal	<ul style="list-style-type: none">To EqualizeTo RestoreTo Return What Was TakenTo CompensateTo Return Prior State of Affairs	<ul style="list-style-type: none">To EqualiseTo Share and Distribute

⁶³ See also the discussion in s 6 of this chapter.

Debate about the Aristotelian distinction and the two types of justice it concerns has continued since it was first introduced. Former Judge of the Supreme Court of Israel, Izhak Englard, has comprehensively traced its history in a landmark study,⁶⁴ highlighting the following key features: Most fundamentally, scholars have debated whether corrective and distributive justice are indeed two fundamentally different, separate types of justice.⁶⁵ Englard notes one particular argument in support of the two being different has been that corrective justice is often held to entail more concrete duties as compared to distributive justice – sharing or distribution do not evoke the same concrete responsibilities as restoring what was taken, it has been argued – ‘[t]he duty arising from a prior right [may be] much stronger.’⁶⁶ Englard concludes that ‘[t]he logical result of that view [may be] that in any case where a duty of compensation was to be recognized, its foundation had to be in [corrective] justice.’⁶⁷

Questions concerning the nature and scope of duties inherent in both justice constructs soon also led to questions about how punishment or penalties fit with both or either type of justice, with some arguing that ‘vindictive justice [...] is to fall under commutative [corrective] justice’⁶⁸ and others asserting ‘that punishment [also] belongs to distributive justice.’⁶⁹ Others yet again have held that ‘vindictive (punitive) justice constitutes a separate kind of justice’ altogether.⁷⁰

A third debate has concerned the relationship of either type of justice with law, in particular their fit with private and public law. Englard argues that

⁶⁴ See Englard, above n 56.

⁶⁵ This debate continues to this day; see, eg, Peter Benson, ‘The Basis of Corrective Justice and Its Relation to Distributive Justice’ (1992) 77 *Iowa Law Review* 515.

⁶⁶ Englard, above n 56, 35. Englard discusses this at length throughout his book, but particularly in chs 2 and 3.

⁶⁷ *Ibid*, 210.

⁶⁸ *Ibid*, 38.

⁶⁹ *Ibid*, 36.

⁷⁰ *Ibid*, 211.

[t]he idea itself that [corrective] justice relates to private acts, distributive justice to public ones, was already explicitly expressed by Aristotle. It was later applied in practice by scholastic authors, who used the Aristotelian distinction as a means for the basic classification of legal fields that ran somewhat parallel to that of public and private law.⁷¹

However, he notes how 18th Century German scholar Donatus Hoffman contended that either type of justice can apply to either type of law, as

the state may engage into buying and selling like private persons; correspondingly, the head of a family may distribute among its members rewards and charges. Hence it is appropriate to distinguish between public distributive and [corrective] justice, and private distributive and [corrective] justice.⁷²

Finally, Englard notes how some have tried to link distributive justice elements with corrective ones. This idea arises in particular in the context of a weakness to be noted in Aristotle's corrective justice construct – that it does not include the possibility of correcting harm, damage or loss in relation to what are seemingly accidents, in situations, for example, where there is no identifiable or particular victimiser or perpetrator – no apparent faulty party. Englard shows how one of the first to therefore propose a role for distributive justice in the correction of harm, loss or damage was German scholar Josef Esser, who argued:

Out of this apparently insoluble situation conducts us the recognition that the distribution of accidental losses, as well as that of goods, is not the task of '[corrective],' i.e. of retributive or reciprocal justice, but that of 'distributive,' i.e. apportioning and allocating justice.⁷³

In other words, harm, damage or losses may have to be corrected through schemes that involve a distributive (or collective, or not strictly or 'purely' corrective) element, an idea which will underpin the discussion in Chapter Six of this thesis. However, Englard also notes that Esser points to an inherent vagueness in the idea of distributive justice – that many 'possible substantive solutions are conceivable' in

⁷¹ Ibid, 177.

⁷² Ibid, 178.

⁷³ Josef Esser, *Grundlagen und Entwicklung der Gefährdungshaftung* [Origins and Development of Strict Liability] (C H Beck, 1941) [trans. Izhak Englard, above n 56, 183].

relation to it but none are strictly or concretely foreseen,⁷⁴ an issue also plaguing distributive justice-based approaches to resolving injustices related to climate burdens, as subsequent thesis chapters will show. In the context of debates about the nature of tort law which emerged particularly in the United States in the latter part of the 20thth Century between purists (who held that the goal of tort law should be to implement corrective justice between a victim and a particular perpetrator) and instrumentalists (who held that tort law should also have instrumental, social goals, in particular the reversal of losses) significant opposition to the idea that distributive (or collectivised) elements have a role to play in corrective justice arose. As Englard notes:

Those scholars who opposed the instrumental approach, being oriented towards economic efficiency, emphasized the postulate of corrective justice that required an exclusive concentration upon the concrete litigants on a basis of strict equality. [...] It meant that the very introduction of distributive considerations into the notion of liability constituted a violation of corrective justice and was, therefore, illegitimate⁷⁵

The debate thus sparked continues: purists insist that corrective justice is fundamentally about the relationship between doer and sufferer, and responsibilities which arise from this. Others support ‘rougher’ understandings of corrective justice which emphasise correction as the goal, irrespective of how and through whom this is to be achieved. As this distinction is essential to the analysis presented in Chapters Five and Six, the following section of this chapter will dissect it in greater detail.

Overall, Aristotle sparked a debate which has carried on for centuries about the nature and scope of his corrective/distributive justice paradigm and the linkages that exist between its constitutive parts. Much of the debate, in the words of Englard, has concerned ‘the right understanding of the two notions of justice and their relationship

⁷⁴ Englard, above n 56, 184.

⁷⁵ Ibid, 190.

to the substance of law.’⁷⁶ This thesis will assume that fundamental differences exist between the two conceptualisations of justice proposed by the Greek philosopher but that both can nevertheless be applied to the same phenomenon (that is, climate change and displacement) and in legal analysis of it. In the words of James Gordley, ‘distributive justice secures a fair share of resources for [all]. Commutative or corrective justice preserves this share.’⁷⁷ The following sections will highlight further the key features of both types of justice, which will then permit their application to the question of the role of international law in climate change and displacement to be investigated in later chapters.

5. Corrective Justice

For Aristotle, corrective justice is about ‘asking whether one [entity] has done and the other suffered injustice, whether one inflicted and the other sustained damage’, which, if the case, entails responsibilities.⁷⁸ Like distributive justice, corrective justice thereby raises questions of allocation and of equality:

The question of corrective justice is not the question of whether and to what extent and in what form and on what ground [something] should now be allocated *among* [the parties], but the question of whether and to what extent and in what form and on what ground it should now be allocated *back* from one party to the other, reversing a transaction that took place between *them*.⁷⁹

According to Weinrib:

Corrective justice embraces quantitative equality in two ways. First, because one party has what belongs to the other party, the actor’s gain is equal to the victim’s loss. Second, the holdings of the parties immediately prior to their interaction provide the baseline from which the gain and the loss are computed. That baseline, accordingly, functions as the mean of equality for this form of justice.⁸⁰

⁷⁶ Ibid, 214.

⁷⁷ James Gordley, ‘Enforcing Promises’ (1995) 83 *California Law Review* 547, 549.

⁷⁸ Aristotle, above n 60, 273-275.

⁷⁹ John Gardner, ‘What is Tort Law For? – Part 1: The Place of Corrective Justice’ (2011) 30 *Law and Philosophy* 1, 8 [italics by present author].

⁸⁰ Weinrib, above n 16, 408.

To put it more simply, for Aristotle, Weinrib and others what is involved is that one entity has unjustly taken something from another. The loss (harm or damage) thereby generated must be reversed and the prior state of affairs re-instated, through a corrective measure imposed upon the entity which has taken something (and thereby gained, in relation to the equality that once existed).⁸¹ Others, however, have argued that ‘corrective justice is a type of justice which [may] concern the conduct of the wrongdoer in particular, while opening up the possibility that [entities] other than the wrongdoer can play a role in its exercise’.⁸² This view implies that there must certainly be a loss bearer, and that that loss bearer should be restored to its prior state of affairs. But it also implies that the latter could be achieved by means other than affecting correction via a wrongdoer only. The distinction just raised – between a corrective justice which is ‘pure’ (or based in Aristotle), and which is about the relationship between victim or loss bearer and wrongdoer, versus a corrective justice which is more ‘rough’ (which departs from Aristotelian origins to a degree), and which supports the seeking of correction via channels that do not necessarily include a specific wrongdoer – is one which will inform the corrective justice-based analysis utilised in this thesis. Before outlining this distinction in greater detail, the following subsections will first briefly consider other key moments in the evolution of corrective justice thought and debate following Aristotle.

Following Aristotle

After Aristotle, some sought to discover whether ‘the dignity of a person is relevant to [...] corrective justice’ – that is whether in meting out penalties for corrective

⁸¹ Ernest J Weinrib, ‘Corrective Justice in a Nutshell’ (2002) 52 *Toronto Law Journal* 349, 355.

⁸² Andrew Gold, *A Theory of Redressive Justice* (7 October 2011), 8 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1940594&download=yes>.

injustices these should be ‘more severe for a person who hits a prince than for one who hits an ordinary person.’⁸³ In other words, the possibility was raised that committing the same faulty act should have different consequences depending on the entities involved.⁸⁴ The aforementioned discussion concerning the nature and scope of duties in corrective justice (as opposed to distributive justice) also flourished for long. Renaissance scholar Francisco de Vitoria, for example, argued:

If Petrus owes me ten ducats, the debt is that he renders me the equal amount. Yet in distributive justice not so much is owed. Given I am suitable for a certain office, then when the King does not give it to me, he does not cause me as much injustice as if it had been mine [...] Equally, note that it is possible that a debt occurs in distributive justice as well as in commutative [corrective] justice, nevertheless a greater debt is in commutative justice, hence if here a mistake is made a greater injustice is done.⁸⁵

Similarly, Vitoria’s near-contemporary, Francisco Suárez, stipulated that only a ‘violation [of corrective justice] gives rise to a *duty* of restitution’.⁸⁶ Englard shows how some contemporary ‘authors continue to claim that only [corrective] justice is a strict and perfect kind of justice’, although others have sought to argue that ‘rights under distributive justice are no less stringent’.⁸⁷

Equal Freedom and Kant

It was 18th century German Enlightenment philosopher Immanuel Kant who brought great novelty to thinking about corrective justice (and distributive justice, for that matter, as a later sub-section of this chapter will show). To understand his contributions, it is important to consider his concept of ‘equal freedom’, or the idea that all humans, in equal measure, have free will, from which their equal worth, rights and freedoms arise. According to Kant:

⁸³ Englard, above n 56, 18; he notes that this was stipulated by Thomas Aquinas, for example.

⁸⁴ Ibid.

⁸⁵ Francisco de Vitoria, *De justitia* [trans. in Izhak Englard, above n 56, 29] vol 1, 2.2, ques LXI, art 2, 3.

⁸⁶ Englard, above n 56, 35 [italics added by thesis author].

⁸⁷ Ibid, 77.

[Man] regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.⁸⁸

What does this mean for corrective justice? Because all human beings are fundamentally equal, imbued with equal worth, rights and freedoms, none should take from others what is not their due (to put it in justice terms), what rightfully belongs to others. According to Richard Wright, then, a Kantian version of corrective justice would be about ‘securing [the] person and [its] existing stock of instrumental goods from interactions with others that are inconsistent with his or her right to equal [...] freedom’.⁸⁹

Ethicists versus Instrumentalists – ‘Pure’ versus ‘Rough’ Corrective Justice

For the corrective justice-based analysis in chapters to follow the perhaps most important scholarly debate arises out of the aforementioned disagreement about the nature of tort law and loss recovery, and the role for, or scope of, corrective justice in them. As was highlighted in a previous sub-section, in the late 20th century a dispute arose between instrumentalists and those who could be termed ethicists about what matters in loss recovery. Peter Cane has outlined how the two camps differ:

The treatment of tort law as a complex set of ethical principles of personal responsibility (and freedom) [note Kant] which concerns how people may, ought or ought not to behave in their dealings with others may be contrasted with what are often called ‘instrumental’ approaches. Instrumentalists view (tort) law as a means (or ‘instrument’) for achieving desired social goals. The social goals most commonly associated with tort law are compensation for injuries and losses, deterrence of harmful conduct, fair distribution of accident risk and costs throughout society, and economic efficiency. An instrumentalist will attempt to explain and justify the rules and principles of tort law as means to a particular end, will criticize rules or principles which do not contribute to the achievement of that end, and may classify them as

⁸⁸ Immanuel Kant, *The Metaphysics of Morals* [trans. Mary Gregor (Cambridge University Press, 1991)] [1797] 434-435.

⁸⁹ Richard W Wright, ‘Private Nuisance Law: A Window on Substantive Justice’ in Andrew Robertson and Donald Nolan (eds), *Rights and Private Law* (Hart Publishing, 2011) 491, 493.

'mistakes'. For the instrumentalist, tort law is best understood as the means to a chosen end.⁹⁰

In other words, on the one side are ethicists, who centre tort law around the idea that specific entities are responsible for correction when an unjust loss, harm or damage has occurred (incorporating Aristotle's version of corrective justice), on the other instrumentalists, who argue that the correction (i.e. compensation) itself or other instrumental matters may be more vital than a focus on the responsibilities of particular entities.

Although this debate has been vigorously conducted by many scholars, the arguments of two stand out. American scholars Jules Coleman and Ernest Weinrib have, respectively, defended strongly the instrumentalist and ethicist approach. Weinrib's position has already been sketched in a previous section. Relying strongly on Aristotle, he argues that in

corrective justice, quantitative equality pairs one party with another. Corrective justice treats the defendant's unjust gain as correlative to the plaintiff's unjust loss. The disturbance of the equality connects two, and only two, [parties].⁹¹

Furthermore, it is

[t]he defendant's gain at the plaintiff's expense [which] justifies simultaneously diminishing the defendant's resources and augmenting the plaintiff's. In contrast, to reject Aristotle is to postulate that the reason for taking resources from the defendant is not the same as the reason for giving resources to the plaintiff. [...] Once plaintiff and defendant are separated, the reason for diminishing the defendant's resources will connect the defendant not to the plaintiff but to other [entities] to whom that reason applies, without justifying the plaintiffs singling out the defendant.⁹²

The latter, Weinrib argues, is not supported by corrective justice. It is a particular party which must have caused harm for another which supports a loss recovery claim founded in corrective justice. Coleman, on the other hand, has asked '[w]ith all the

⁹⁰ Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 24.

⁹¹ Weinrib, above n 16, 410

⁹² Ibid, 409.

options available for allocating costs [...] why impose them on particular injurers?'⁹³

Instead, Coleman enunciates his 'annulment thesis' which 'holds only that the victim's losses ought to be annulled',⁹⁴ irrespective of the method. After all,

On balance, it might be that the fairest and most efficient compensation and liability scheme is one in which victims draw payment from a fund stocked by liability judgments against injurers who are at fault, though no such injurer is directly liable to his victim and no victim recovers directly from his injurer.⁹⁵

Weinrib and Coleman have not reached agreement. Weinrib has remained critical of Coleman's theory, as it does not insist on a specific perpetrator, in response to which Coleman has attempted to tweak his 'annulment thesis' to a degree.⁹⁶ Coleman certainly does agree that 'the claims of corrective justice arise only with respect to losses associated with human agency' in some form.⁹⁷ He also notes that

claims in corrective justice are claims to repair or rectification. Again, different accounts are likely to pick out different objects of rectification. One way in which Ernest Weinrib's theory and mine differ is that in his account the object of rectification is the 'wrong', whereas in my account it is the 'wrongful loss'. The difference between us reflects differences in our overall political and metaphysical commitments. For me, corrective justice is to be understood as a practice [...] that emphasizes autonomy and well-being: thus, the emphasis on loss, which I think of in terms of diminished welfare. For Weinrib, [...] the important normative objects are abstract and only indirectly connected to human welfare or interests: thus, the emphasis on wrongs [...]. Whatever our differences, both of us are committed to the importance of rectification as an element of corrective justice.⁹⁸

What remains are two visions for corrective justice in the recovery of losses. One, which this thesis will refer to as 'pure', as it is founded more closely in Aristotle's original construction of corrective justice, and which insists that a particular wrongdoer or perpetrator must be responsible for recovering losses and re-instating a

⁹³ Jules Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 *Indiana Law Journal* 349, 352.

⁹⁴ *Ibid.*, 368.

⁹⁵ *Ibid.*, 352.

⁹⁶ See Curtis Bridgeman, 'Corrective Justice in Contract Law: Is There a Case for Punitive Damages?' (2003) 56 *Vanderbilt Law Review* 237, Stephen Perry, 'Comment on Coleman: Corrective Justice' (1992) 67 *Indiana Law Journal* 381; also Ernest J Weinrib, 'Non-Relational Relationships: A Note on Coleman's New Theory' (1992) 77 *Iowa Law Review* 445.

⁹⁷ Jules Coleman, 'The Practice of Corrective Justice' in David Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, 1995) 53, 66.

⁹⁸ *Ibid.*

prior state of affairs (although this could be several that are jointly responsible, as long as they are all specifically responsible). In other words, a particular party (or parties) has acted faultily, entailing *its* responsibility. The other version, which this thesis will refer to as ‘rough’, insists only that there must be a loss bearer and loss recovery, but it does not insist on one form or mode of recovery, or tying loss recovery necessarily to a *particular* party which has acted faultily. Jules Coleman notes how this opens up various possibilities as to how correction is enacted: ‘Should valid claims to repair be made good by the use of a general insurance scheme? Should they instead be covered by [an] injurer?’⁹⁹ Adrian Vermeule, amongst many others, has argued in favour of a ‘rough justice’ in some reparations context: rough justice, for him, is about ‘the intuition that sometimes it is permissible, even mandatory, to enact a scheme of compensatory reparations that is indefensible according to any first-best criterion of justice’,¹⁰⁰ or in light of ‘purer’ versions of corrective justice.

Final Words

Corrective justice theory has stimulated much debate since Aristotle made it an integral part of his justice paradigm. Debate has concerned the nature and source of duties which arise under corrective justice. Importantly for this thesis, a recent dialogue has also concerned whether corrective justice must be applied through law in its ‘pure’ Aristotelian conception, or whether there are opportunities for corrective justice under ‘rougher’ conceptualisations of the construct. How or on what grounds the re-instatement of a prior state of affairs occurs differs amongst the two versions: one depends on the faulty conduct of a specific actor (or actors) against another, from

⁹⁹ Coleman, above n 93, 352.

¹⁰⁰ Adrian Vermeule, ‘Reparations as Rough Justice’ (Public Law and Legal Theory Working Paper No 105, Law School, The University of Chicago, 2005) 2.

which, in legal terms, liability arises. The other emphasises the establishment of a loss, and thereby loss bearers, and less so the faulty action of a *particular* loss causer. Even in the absence of the latter, it argues that restoration of a loss, or a prior state of affairs, must be affected where human involvement has led to loss.

Chapters Five and Six of this thesis will seek to exploit this distinction. Chapter Five will focus on opportunities to frame climate change and displacement as an injustice in the ‘pure’ corrective justice sense – where an explicit faulty party (or parties) responsible for displacement can be established. As the chapter will show, this remains very challenging. Chapter Six will therefore turn to ‘rough’ corrective justice and analyse how no-fault compensation schemes such as insurance, which do not depend on a particularised faulty party or wrongdoer, may be relevant. However, the current chapter now first turns to exploring the evolution of distributive justice, which, in later chapters (Seven and Eight) will permit analysis of the climate change and displacement topic as an issue of unequal distribution of benefits and burdens, for which different legal remedies or mechanisms apply.

6. Distributive Justice

Aristotle and After

Aristotle argued that ‘[a]ll are agreed that justice in distribution must be based on desert of some sort, although they do not mean the same sort of desert’.¹⁰¹ In other words, ‘[i]n its original, Aristotelian sense, “distributive justice” referred to the principles ensuring that deserving people are rewarded in accordance with their

¹⁰¹ Aristotle, above n 60, 271f.

merits, especially regarding their political status'.¹⁰² This may, perhaps, not represent the most suitable basis by which to consider the range of distributive justice issues that arise in relation to climate change and displacement.¹⁰³ As argued by Fleischacker, '[t]o say that a person "merits" a certain thing suggests that he or she has some excellent quality or has performed some excellent action to which that thing is fitting.'¹⁰⁴ However, in a landmark study of the historical evolution of distributive justice thought and debate, Fleischacker shows, how, over time, distributive justice came to refer to distribution not only as tied to desert or merit but other matters, including simply a person's humanity or a person's (or other entity's) disadvantage, which makes its application useful to consider for the purposes of this thesis in more wide-ranging ways. Fleischacker has traced distributive justice's evolution as follows:

Merit and desert continued to dominate distributive justice thinking for centuries following Aristotle. For example, Thomas Aquinas noted in the 13th century, that it concerns 'common property [which] is distributed to the individual according to the latter's excellence [...] in the community.'¹⁰⁵ Fleischacker shows how eventually, however, notions of charity, beneficence or the needs of others began to enter distributive justice thinking, even where not always expressly focused on justice per se. Cicero, for example,

contrasts justice with beneficence, saying that justice can and should be legally required of us while beneficence should not be, that violations of justice inflict positive harm, while failings of beneficence merely deprive people of a benefit and that duties of justice are owed to anyone, anywhere, while duties of beneficence are owed more to friends, relatives, and fellow citizens than to strangers.¹⁰⁶

¹⁰² Fleischacker, above n 7, 2.

¹⁰³ Although, as ch 8 of this thesis will argue, it is a partially suitable basis by which to consider opportunities for burden-sharing amongst states the 'burden' of displacement.

¹⁰⁴ Fleischacker, above n 7, 7.

¹⁰⁵ Englund, above n 56, 15f.

¹⁰⁶ Fleischacker, above n 7, 20; see Marcus Tullius Cicero, *De Officiis* [trans. M T Griffin and E M Atkins, *On Duties* (Cambridge University Press, 1991)] [44 BC].

Three things are important here: beneficence is not justice, it is not a duty and it is only owed communally (certainly not across borders). This makes it difficult to apply to distributive justice analysis in the climate change context.

Hugo Grotius introduced ‘a distinction between expletive justice, which governs human laws according to legal rights, and attributive justice, which relates to virtues such as generosity and compassion’,¹⁰⁷ or charity and beneficence again. In relation to the latter, he also developed a concept intriguingly called the ‘law of love’, which does not ‘belong to the legal domain’ but should compel virtuous human action in relation to fellow human beings.¹⁰⁸ Samuel Pufendorf argued that there are ‘perfect rights’ (concrete) and ‘imperfect rights’ (not concrete) evoked by different types of justice: ‘perfect rights can be exacted more rigorously than imperfect ones, but imperfect ones can in principle also be exacted’, particularly in grave circumstances.¹⁰⁹ In other words, need may determine what is owed. John Locke argued that ‘justice gives every man a title to the product of his honest industry and the fair acquisition of his ancestors [...], so charity gives every man a title to so much out of another’s plenty as will keep him from extreme want where he has no means to subsist otherwise’.¹¹⁰

Fleischacker shows how it is Adam Smith who more concretely tied ‘imperfect rights’ to distributive justice – which means it is not owed absolutely but only to some: ‘Smith takes distributive justice to include duties of parents to children, of beneficiaries to benefactors, of friends and neighbours to one another, and of

¹⁰⁷ Marco Grasso, *Justice in Funding Adaptation under the International Climate Change Regime* (Springer, 2010) 32; see Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [trans. Francis W Kelsey, *On the Law of War and Peace* (Oxford University Press, 1925)] [1625].

¹⁰⁸ Fleischacker, above n 7, 23f.

¹⁰⁹ Ibid, 24; see Samuel Pufendorf, *De Jure Naturae et Gentium* [trans. C H Oldfather and W A Oldfather, *The Law of Nature and Nations* (Clarendon Press, 1934)].

¹¹⁰ John Locke, *Two Treaties of Government* (Orion Publishing, 1993) vol I, 4.42; in Fleischacker, above n 7, 25.

everyone to people of ‘merit’.¹¹¹ In line with Aristotle, merit still matters, in other words: ‘we are said to do injustice to a man of merit who is connected with us [...] if we do not exert ourselves to serve him’, Smith argues.¹¹²

Distributive justice thinking following Aristotle therefore evidences several features: under the influence of Aristotle, many continued to argue that it is tied to merit – whether based on political standing (Aristotle himself), excellent contributions to community (Aquinas) or the familial or communal ties that bind us to others (Smith). Others began to contemplate that charity or support of some kind may be owed to others (i.e. Grotius, Pufendorf, Locke), not necessarily because they merit it on account of their standing, or even as a matter of justice, but because of circumstance. Although this may not be owed strictly, the more need is implied in a given situation, the stronger the impetus to assist should be. For the discussion of the relevance of distributive justice to the climate change and displacement context this is relevant only in as so much that those who can assist should feel compelled to do so the more dire the circumstance.

Broadening the Scope of Distributive Justice

From its origins, Fleischacker notes how it is 18th century ‘political developments that made the eradication of poverty begin to look possible, from which the modern notion of distributive justice was born.’¹¹³ He argues that it is Jean-Jacques Rousseau who first made citizens, specifically, responsible for this (poverty eradication) and countering other social ills: ‘if society causes most human suffering, we can infer that society should also be able to cure most human evils,’ in particular through

¹¹¹ Fleischacker, above n 7, 27.

¹¹² Adam Smith, *The Theory of Moral Sentiments* [ed. D D Raphael and A L Macfie (Oxford University Press, 1976)] [1759] 269; in Fleischacker, above n 7, 27.

¹¹³ Fleischacker, above n 7, 54.

employment of its formal institutions.¹¹⁴ So distributive justice here is no longer so much about the distribution of benefits to ‘excellent people’ (Aristotle, Aquinas) but the countering of burdens borne by the least well-off as a collective social goal.

Broadening the scope of duties in relation to distributive justice (and to deprivation in particular) even further was Immanuel Kant, whose concept of ‘equal freedom’ has already been introduced in a prior section. Fleischacker notes how, first of all, it is important to understand that what Kant meant by ‘distributive justice’ is ‘the mechanism by which laws are enforced’ – so the ‘distribution’ inherent in process.¹¹⁵ Nevertheless, Kant also considered in some detail other questions of distribution – as pertaining to property, resources and assistance. Fleischacker shows how Kant essentially crafts two arguments in relation to human deprivation (or the duties between haves and have-nots): First, he makes an economic argument rooted, to a degree in his ‘equal freedom’ concept: ‘The thought seems to be that the goods provided to us by nature come in a fixed amount, so if they were divided up fairly, everyone would get an equal share of them. Wealth, then, is only possible if some people cheat others out of what is rightfully theirs.’¹¹⁶ Public authority should counter this tendency and work for the benefit of those who do not have what they deserve. Fleischacker calls this ‘an embarrassingly bad argument’ (‘wealth as robbery’).¹¹⁷

Kant also pursued a different argument, also strongly supportive of *public* assistance to the needy and rooted in his ‘equal freedom’ notion:

State-run provision of the poor, on Kant’s view, has moral advantages over private charity. Kant sees moral corruption in the private relationships by which well-off

¹¹⁴ Ibid, 55f.

¹¹⁵ Ibid, 69.

¹¹⁶ Ibid, 71.

¹¹⁷ Ibid, 70, 71.

people bestow their bounty to the needy and looks to the state to provide for a more respectful relationship between rich and poor.’¹¹⁸

He argues for a distribution by which ‘the poor man could [...] be helped in some other way which would not entail his being degraded by accepting alms,’¹¹⁹ with his equal worth thereby diminished.¹²⁰ Rather, responsibilities to those well-off should be collectivised, for example through the raising of taxes, making ‘care for the poor [...] everyone’s obligation to one another, a part of the duties moral equals have to one another, rather than an expression of the special virtues of some.’¹²¹ In the context of 18th century social revolutions, such thinking found fertile ground.¹²²

The 18th century brought new direction to distributive justice thinking: both Rousseau and Kant argued that the object of distribution must not only be the allocation of benefits amongst ‘deserving’ people but also public assistance for the benefit of those who suffer deprivation (the alleviation of their burdens). Kant, in particular, contended that responsibilities in the context of human deprivations are not owed because people must be deserving on account of their standing in community but because of their innate humanity and equal worth. For the purposes of the analysis in later sections of this thesis what is important is that this permitted the idea of distributive justice to become disconnected from the idea of deserving it on account of community standing. The reconceptualization from benefit sharing to burden alleviation will also be important. However, both Kant and Rousseau’s ideas operate, still, in the context of the nation – in other words, though evidencing much broader conceptualisations of distributive justice, its beneficiaries are envisioned to

¹¹⁸ Ibid, 71.

¹¹⁹ Immanuel Kant, *Lectures on Ethics* [eds. J B Schneewind and Peter Heath, trans. Peter Heath, *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1997)] 236; in Fleischacker, above n 7, 70.

¹²⁰ Fleischacker, above n 7, 72.

¹²¹ Ibid, 73.

¹²² Ibid, 75ff.

be citizens. With climate change and its effects a global, cross-border issue, distributive justice thinking had to develop further before it is fully applicable for the purposes of this thesis.

It may also be important to note that the 18th century brought great resistance to the idea of public support in the context of human deprivation. Fleischacker highlights, in particular, the thinking of Thomas Malthus, Edmund Burke and Bernard Mandeville. Mandeville, for example, supported the ‘utility of poverty’ notion, arguing that

hunger was useful in that it spurred the poor to labor. But this makes hunger useful both to society as a whole and to the poor themselves; once they labored, they would eat, and if they did not have the spur of hunger, they would waste and drink away their lives. For the Social Darwinists, the hunger of the poor was useful to the rest of society.¹²³

This thesis will not engage with whether any of this may be useful to thinking about the detrimental consequences of climate change (it will simply assume that it is not). However, the ideological battles inherent in the juxtaposition of the two visions which crystallised in the 18th century – one in favour of public intervention to counter misery, one clearly against it – undoubtedly continues in many places to this day; memorably during contemporary elections campaigns in the United States.¹²⁴

The Greatest Benefit for the Greatest Number

Fleischacker next turns to 19th century utilitarians and their concerns over a ‘tendency to poverty on the part of the many, [and] the ostentation of excessive wealth on the part of the few’.¹²⁵ He argues that

¹²³ Ibid, 85.

¹²⁴ See, eg, Paul Adams, ‘Obama and Romney: A Battle of Ideologies’, *BBC News* (online), 20 October 2012 <<http://www.bbc.co.uk/news/world-us-canada-19976747>>.

¹²⁵ William Thompson, *An Inquiry into the Principles of the Distribution of Wealth Most Conducive to Human Happiness* (Oxford University Press, 1824) xvii.

[u]tilitarianism is not a doctrine friendly to the idea that individuals have any absolute rights. The emphasis on the absolute importance of individual human beings, and of their freedom rather than their happiness, does not sit well with the utilitarian emphasis on spreading happiness among as many people as possible.

Utilitarian Jeremy Bentham therefore stipulated that '[n]o law ought to be made that does not add more to the general mass of felicity than it takes from it.'¹²⁶ The rise of the welfare state in many countries can be attributed directly to utilitarians such as Bentham, and with it social structures which were arguably more just.¹²⁷

And yet, Fleischacker argues that justice per se is not easily located in utilitarianism.¹²⁸ He notes that John Stuart Mill provided one reason why this is so: 'people find it difficult to see in justice only a particular kind or branch of general utility.'¹²⁹ Fleischacker puts this slightly differently: why should some individuals accept that they may be 'sacrificed' for the greater good?' and for this then to be conceptualised as justice.¹³⁰ Utilitarians have not been able to provide an acceptable justification. Furthermore, 'utilitarianism aims at pleasure and avoidance of pain', that is 'feelings' or 'sensory states', which, Fleischacker argues, may be a doubtful foundation for a just ordering of the social world.¹³¹

Utilitarians shaped thinking about distributive justice and their vision influenced societies arguably distributively more fair and balanced in practice. In theory there is nothing that prevents consideration of the 'greater happiness for the greatest number' notion also in a cross border context. However, applying the concept to climate change and its detrimental effects, it may be doubtful that a concept focused on being relevant to the many would necessarily address those most in need.

¹²⁶ Jeremy Bentham, 'Anarchical Fallacies: Being an Examination of the Declarations of the Rights Issued During the French Revolution' in John Brownin (ed), *The Works of Jeremy Bentham* (William Tait, 1838-1843) vol 2, 493; in Fleischacker, above n 7, 106.

¹²⁷ Fleischacker above n 7, 104ff,

¹²⁸ Ibid, 107.

¹²⁹ John Stuart Mill, *Utilitarianism* (ebooks@Adelaide, 2012) ch 5.

¹³⁰ Fleischacker, above n 7, 107f.

¹³¹ Ibid, 108f.

The Means to Production and the Good of Others

19th century Germany philosopher Karl Marx also made a novel contribution to distributive justice thinking, although Fleischacker notes that “it is a mistake to see Marx himself as a defender of distributive justice”.¹³² In fact, Norman Geras has queried whether

Marx himself condemn[ed] capitalism as unjust? There are those who have argued energetically that he did not; and as many who are equally insistent that he did—a straightforward enough division, despite some differences of approach on either side of it. To prevent misunderstanding, it is worth underlining at the outset that the question being addressed is not that of whether Marx did indeed *condemn* capitalism, as opposed just to analysing, describing, explaining its nature and tendencies. All parties to this dispute agree that he did, agree in other words that there is some such normative dimension to his thought, and frankly, I do not think the denial of it worth taking seriously any longer. The question is the more specific one: does Marx condemn capitalism in the light of any principle of *justice*?¹³³

What is beyond doubt is that Marx dealt with questions of distribution, but his focus was not on the distribution of charity, benevolence, assistance, or a greater good for the greatest number, but the means to production, which influences ‘the balance of power in any society [...] far more [...] than the distribution of goods.’¹³⁴ Justice thinking itself he considered a ‘baleful historical relic’.¹³⁵

Finally, Marx also leaned on Rousseau and Kant in encouraging consideration of the ‘other’:

According to him, we human beings are ‘species beings,’ which means both that we think in terms of universals [...] and that we most fully and freely express our nature by acting as members of our species rather than acting as if we were isolated individuals. [...] [S]ince we think about everything in universal terms, we think of ourselves in universal terms too, and we therefore distort our own conception of ourselves when we treat ourselves as isolated individuals. Instead, we should see ourselves as instances of the universal kind, ‘human being.’ [...] The distinction between individual and society would disappear, and societies would act for their individual members even while those members acted to promote the good of the society. Like the three musketeers, all would be for one and one would be for all.¹³⁶

¹³² Ibid, 96. Note, for example, Karl Marx in *Critique of the Gotha Programme* (Wildside Press, 2008).

¹³³ See, eg. Norman Geras, ‘The Controversy about Marx and Justice’ (1985) 150 *New Left Law Review* 47, 47.

¹³⁴ Fleischacker, above n 7, 97.

¹³⁵ Ibid, 96.

¹³⁶ Ibid, 100f.

In other words, even though Marx did not expressly think in justice terms, he argued that our nature and our interests should compel us to work also for the benefit of others (all others, not just 'deserving others').

For the analysis of climate change-related issues, several matters are important: first, it may be possible to construe injustices in relation to the concept of the 'means to production'. As Chapter Seven, in particular, will argue, greenhouse gas emissions have been, and are, overwhelmingly the result of processes of production in just a handful of countries. Their detrimental consequences, however, will overwhelmingly be felt elsewhere, in places where their generation cannot be impacted. Secondly, Marx encourages acts which promote also the well-being of other members of 'society', on account of our 'species being'. Applying this to climate change and its harmful consequences depends, however, on one's conceptualisation of 'society'. Only where 'international society' is implied could this be relevant. To support such an argument, this section now turns to John Rawls and those who have extended his theory of justice beyond borders.

The Least Well-Off and the 'Veil of Ignorance'

The most important contemporary contribution to distributive justice theory and debate originates from the late American scholar John Rawls and his landmark monograph, *A Theory of Justice*. Rawls took for granted that 'a society is a cooperative venture for mutual advantage', and that 'social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts.'¹³⁷ He then argued that 'a set of principles is required for choosing among the various social arrangements [...] an agreement on the proper distributive

¹³⁷ Rawls, above n 3, 4.

shares', 'the appropriate distribution of the benefits and burdens of social cooperation.'¹³⁸ He argued that this must be founded in the understanding that 'men born into different positions have different expectations of life determined, in part [...] by economic and social circumstances [...], which are especially deep inequalities [...] that affect men's initial chances in life; yet they cannot possibly be justified'.¹³⁹ From here, Rawls developed a distributive justice theory based on the following two essential principles:

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
2. Social and economic inequalities are to be arranged so that they are both:
 - a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and
 - b) Attached to offices and positions open to all under conditions of fair equality of opportunity.¹⁴⁰

To achieve the arrangement of social and economic inequalities for the benefit of the least advantaged, Rawls suggested several devices: first the concept of the 'veil of ignorance', whereby people (decision makers) 'do not know how [...] various alternatives will affect their own particular case and they [thereby] are obliged to evaluate principles solely on the basis of general consideration,' without knowledge of their 'own place in society, [their] class position and social status; nor [their] fortune in the distribution of natural assets and abilities'.¹⁴¹ On this basis, he urged adherence to the 'difference principle', by which it is 'the least advantaged representative man whose expectations we are to maximize',¹⁴² because that 'man' may also be 'me', certainly if one is to operate from behind a 'veil of ignorance'. Fleischacker notes how far Rawls had advanced distributive justice theory from its

¹³⁸ Ibid.

¹³⁹ Ibid, 7.

¹⁴⁰ Ibid, 266.

¹⁴¹ Ibid, 118.

¹⁴² Ibid, 69.

Aristotelian origins in the notion of particular merit and desert to the notion that its object must be the least well-off.¹⁴³

Fleischacker also notes how there are several matters not addressed by Rawls; for example, what exactly is to be distributed.¹⁴⁴ Rawls had 'primary goods' in mind, things that all rational beings are meant to desire, more particularly, 'rights, liberties, and opportunities, and income and wealth.'¹⁴⁵ Others have considered the distribution of 'cultural membership' or 'recognition capital'.¹⁴⁶ Amartya Sen and Martha Nussbaum have also trenchantly challenged a focus on 'goods': Sen, for example, has stated: 'Rawls takes primary goods as the embodiment of advantage rather than taking advantage to be a relationship between persons and goods.'¹⁴⁷ Fleischacker shows how Sen instead urges that 'we need to be concerned not so much with the goods people have but as with their capacity to act'.¹⁴⁸ From this premise Martha Nussbaum has developed a 'list of human capabilities at whose development distributive justice ought to aim.'¹⁴⁹

Perhaps more important for the analysis in later chapters have been debates which concern the applicability of Rawls' theory of justice in the cross border context. Rawls himself based his theory on the idea of a 'basic structure of society', which 'should be appraised from the position of equal citizenship' in a nation state.¹⁵⁰ In his *Law of Peoples* he also argues that the difference principle is

¹⁴³ Fleischacker, above n 7, 112.

¹⁴⁴ Ibid, 116ff.

¹⁴⁵ Rawls, above n 3, eg, 79.

¹⁴⁶ Fleischacker, above n 7, 122. He cites, eg, Will Kymlicka, *Liberalism, Community and Culture* (Clarendon Press, 1989) and James Tully, 'Struggles over Recognition and Distribution' (2000) 7 *Constellations* 469.

¹⁴⁷ Amartya Sen, 'Equality of What? (Tanner Lecture on Human Values, Stanford University, 1979) 216; in Fleischacker, above n 7, 118.

¹⁴⁸ Fleischacker, above n 7, 118.

¹⁴⁹ Ibid; he cites Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999).

¹⁵⁰ Rawls, above n 3, 82.

constrained by borders.¹⁵¹ Others have questioned the logic of this: 'Unless liberal theory can satisfactorily explain why a social contract should include only certain individuals while leaving others out, a global contract seems the only possible option [...].'¹⁵² Thomas Pogge and Charles Beitz have been particularly forceful in arguing that Rawls' theory could and should apply across borders. Pogge, for example, has maintained that

[n]ationality is just one further deep contingency (like genetic endowment, race, gender, and social class), one more potential basis of [...] inequalities that are inescapable and present from birth. Within Rawls's conception, there is no reason to treat this case differently from the others.¹⁵³

Beitz has contended:

[I]f evidence of global economic and political interdependence shows the existence of a global scheme of social cooperation, we should not view national boundaries as having fundamental moral significance. Since boundaries are not coextensive with the scope of social cooperation, they do not mark the limits of social obligation. Thus the parties to the original position cannot be assumed to know that they are members of a particular national society, choosing principles of justice primarily for that society. The veil of ignorance must extend to all matters of national citizenship, and the principles chosen will therefore apply globally.¹⁵⁴

Social cooperation in the context of the nation state is essential to Rawls – *it* lies at the heart of justifying distribution. However, Pogge maintains that '[o]n the wide notion of basic structure which I am presupposing, any comprehensive social system has a basic structure and thus falls within the purview of Rawls's conception of justice.'¹⁵⁵ Therefore, '[t]aken seriously, Rawls's conception of justice will make the life prospects of the globally least advantaged the primary standard for assessing our social institutions.'¹⁵⁶

Rawls will be important for the analysis in later chapters. Both the 'difference principle' and the 'veil of ignorance' will form vital analytical backbones to

¹⁵¹ John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

¹⁵² Yael Tamir, *Liberal Nationalism* (Princeton University Press, 1993) 120.

¹⁵³ Thomas Pogge, *Realising Rawls* (Cornell University Press, 1989) 247.

¹⁵⁴ Charles Beitz, *Political Theory and International Relations* (Princeton University Press, 1979) 151.

¹⁵⁵ Pogge, above n 153, 24.

¹⁵⁶ Thomas Pogge, 'Rawls and Global Justice' (1988) 18 *Canadian Journal of Philosophy* 241.

arguments advanced. The difference principle, which holds that the purpose of justice is to benefit the least-advantaged, will underpin, in particular, analysis in Chapter Seven, which investigates what is owed in relation to those burdened by climate change impacts (the least advantaged) and those who have contributed to such burdens. The 'veil of ignorance' will reappear in Chapter Eight, which investigates opportunities for burden-sharing of displacees, which states may wish to engage in under conditions of uncertainty about burdens that they face. Rawls himself is therefore important. More important may be that his theory of justice has been conceptualised as applying also beyond borders – amongst 'international society'. Climate change is not a domestic issue; its causes and effects are not bound by borders. Rawls, as extended by Beitz, Pogge and others, therefore provides a particularly relevant distributive justice theory.

Final Words

The preceding sub-sections present several challenges and opportunities for the distributive justice based analysis to follow in later chapters (Seven and Eight): First, the idea of distributive justice has been extended as applying not only between deserving or closely bounded parties and the benefits which should be shared amongst them but, more generally, between those advantaged and disadvantaged, and the burdens that should be alleviated amongst them (see, e.g., Rousseau and Kant). In fact, in accordance with Rawls, the object of distributive justice ought to be the least well off, towards whom resources are to be channelled. This provides a solid basis from which to argue that distributive justice in the climate change context should evolve for the benefit of those who will be most burdened by its effects. In the climate change displacement context, more particularly, Chapters Seven and Eight

will explore the burden that is displacement itself for those affected, as well as the burden that is responding to it. The chapters will set up both issues as matters of distributive injustices and explore their distributively just resolution in the context of justice theories just explored and in relation to international law.

Secondly, the preceding sections highlight a trajectory whereby distributive justice has moved from concerning those who have merited or deserved it based on the belonging to political, cultural or familial community, to those who deserve it based on their belonging to national community, to those who are deserving based on their membership in 'international society'. In other words, the importance of the border to distributive justice thinking (at least) has slowly been eroded, making it a particularly worthwhile construct to resort to for analysis of a phenomenon which arises in connection with a global issue such as climate change.

Finally, however, as highlighted by several commentators explored in the preceding pages, distributive justice, arguably, supports a weaker duty-rights relationship as compared to corrective justice and therefore may present challenges of legal enforceability (nowhere more so than in the context of international law, as will be shown). Although later chapters will contend that the demands which could be raised for distributive justice are particularly clear and pronounced in the anthropogenic climate change context (including climate change and displacement), the reality that distributive justice is often not necessarily regulated (or enforceable) through (hard) law prevails, making distributive justice for those burdened by the ill effects of climate change an uncertain prospect.

7. Conclusion

Kelsen accused Aristotle of having provided a paradigm empty of substance.¹⁵⁷ Countering this, Weinrib has argued ‘that the corrective and distributive justice of Aristotle’s account are formal categories, not substantive prescriptions’.¹⁵⁸ Their importance ‘lies in the [very] differentiation between corrective and distributive justice [...]. Aristotle’s account as a whole is not tautologous’,¹⁵⁹ ‘the forms are [...] decisive for whatever content one might consider’.¹⁶⁰ In any case, the multiple thinkers and scholars considered in this chapter have put ‘flesh on the bones’ of Aristotle’s basic construction.

This thesis accepts that corrective and distributive justice indeed provide useful analytical structures or forms by which to consider the phenomenon of displacement in the climate change context. Rather than simply formulating it as a concern of one or the other, the following four chapters seek to analyse in particular its potential treatment in, or resolution under, international law in light of either justice paradigm. Drawing on the debates just presented, Chapter Five will seek to discuss whether a ‘perfect’ or ‘pure’ corrective claim could materialise under international law – one which is able to identify both loss bearers and the specific perpetrator(s) of harm or loss, locate faulty or wrongful conduct and isolate quantifiable harm. It will also discuss the extent to which international law incorporates and reflects corrective justice and how this may influence the likelihood of a successful ‘pure’ corrective claim. Given, in particular, the many causality issues and uncertainties surrounding climate change and displacement (and climate change more generally) as outlined in earlier chapters, Chapter Six will rely on instrumentalist approaches to corrective

¹⁵⁷ Weinrib, above n 16, 411.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, 412.

¹⁶⁰ Ibid, 413.

justice, as, for example, advanced by Coleman, to analyse corrective justice-based solutions for climate change and displacement that are more 'rough', that do not insist on the establishment of a *particular* duty bearer through whom corrective justice must be achieved. The potential role of no-fault insurance as corrective justice and in relation to climate change and displacement will be investigated, as will be support for cross-border insurance under international law.¹⁶¹

Elizabeth Anderson has noted that distributive justice could also be conceptualised in terms of 'compensation', in 'that people should be compensated for undeserved misfortunes and that the compensation should come from that part of others' good fortune that is undeserved'¹⁶² Chapter Seven will therefore move the discussion from displacement in the climate change context being a (wrongful) harm to it being an unjust and disproportionate burden or misfortune which is connected to others' unjust and disproportionate benefits and advantages, from which certain assistance responsibilities (this thesis will not conceptualise such responsibilities as compensation) should arise under distributive justice. Chapter Seven will also show how international law incorporates and reflects distributive justice principles and the extent to which this may support the distribution in particular of the many costs associated with climate change burdens, such as displacement, to those affected. Chapter Eight, finally, will consider distributional issues connected to carrying the sheltering burden related to displacees. The chapter will therefore use the distributive justice lens to investigate if and how the concept of international burden-sharing may present a viable international mechanism to distribute some of the costs and burdens arising in relation to displacement in the climate change context. It locates commitments to international burden-sharing in broader international principles of

¹⁶¹ Note that the key themes presented in Chapters Five and Six will inform a forthcoming publication.

¹⁶² Elizabeth S Anderson, 'What is the Point of Equality?' (1999) 109 *Ethics* 287, 290. Also Matt Matravers, *Responsibility and Justice* (Polity Press, 2007) 71f.

solidarity and co-operation and will discuss the extent to which these feature in international law. It will also consider the history of burden-sharing theory and practice to analyse the concept's relevance to displacement in the climate change context.

Permeating the chapters, and the thesis conclusion, will be analysis of the consequences of framing the problem and its resolution correctively or distributively. Questions already raised in relation to the nature and extent of rights and duties which arise under each justice paradigm, for example, will therefore be applied to the discussion. In that sense, the thesis will not only investigate the possibilities that exist in international law for corrective or distributive resolution of the climate change and displacement phenomenon but also evaluate the strength, weakness and consequences of either approach against the other.

CHAPTER 5

Fault-Centred, ‘Pure’ Corrective Justice

It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.¹
(*Factory at Chorzow Case*, 1927)

1. Introduction

Previous chapters have described the phenomenon with which this thesis is concerned, its treatment in the international law scholarship and the conceptual framework which will inform analysis in the remaining chapters. Chapter Five will focus on one part of the justice framework just introduced – that is, it will investigate in particular opportunities for corrective justice under international law for entities impacted by displacement in the climate change context. More specifically, the chapter is concerned with a conception of corrective justice which is fault-centred and based on the idea that a *particular* entity (or several specific ones) has acted faultily (has caused harm that is unjust and wrongful), thereby causing unjust losses, damage or harm for another entity (or several), making *it* liable for correction. This was considered a ‘purer’ version of corrective justice in the previous chapter, as it insists on a direct link between a loss bearer and a particular entity responsible for that loss (or harm or damage), from which emanates a duty to compensate (Ernest Weinrib’s version of distributive justice, introduced in the last chapter and strongly based in Aristotle). In other words, compensation here can only be enacted via the specific agent responsible for the harm, damage or loss in the first place. In essence, this means that two parameters will have to be isolated before correction can be

¹ *Factory at Chorzow (Germany v Poland)* [1927] PCIJ (ser A) No 17, 47.

contemplated: a) the bearer(s) of harm, loss or damage; b) perhaps more importantly, a specific perpetrator (or several) to whom faulty action leading to loss, damage or harm (for the loss bearer) could specifically be attributed. It is also important to c) investigate if the harm, loss or damage induced is actually correctable (in particular through compensation), as corrective justice – ‘pure’ or not – presumes that a prior state of affairs can be restored. Because this thesis is concerned with international law, the relevance of corrective justice to that particular legal order, naturally, also requires significant attention. The following sections will therefore seek to tease out the following: First, whether it is possible to isolate casualties or loss bearers in the climate change displacement context and whether such entities could find a forum where correction of their losses could be demanded. Secondly, and perhaps most importantly, whether climate change and its detrimental impacts such as displacement provide opportunities to isolate a *particular* perpetrator (or several) to whom faulty (harmful and wrongful) action leading to damage, loss or harm could be attributed. Thirdly, whether it is actually possible to restore a prior state of affairs in the displacement context through compensation. Finally, although where pertinent, findings throughout the chapter will have been related back to relevant provisions in international law, it is a final section which will consider in greater detail whether ‘pure’ corrective justice is a feature of international law in ways that are of some relevance to considering climate change-related harms, loss or damage, including in relation to displacement in the climate change context.

2. From Responsibility to Legal Liability

This thesis uses justice theory to contemplate the various responsibilities (especially legal ones) held by certain greenhouse gas emitters towards those who may experience detrimental consequences (especially displacement) from such emissions. Chapter Five is particularly concerned with the idea that a specific entity (or several) could be held legally liable for the detrimental consequences of their emissions. Before analysing how all the different entities and elements in a ‘pure’ corrective justice claim may be dissected, the current section will first briefly outline how responsibility for emissions and their consequences is at least in theory converted into the legal liability of certain emitters, particularly in relation to displacement.

Responsibility itself is conceptually intricate. Fundamentally, three different types of responsibility can be distinguished: causal, moral and legal.² Relating the first conception back to the climate change context, we might now say with some certainty that the burning of fossil fuels as a result of relatively recent human activity is *responsible* for current global warming. In that vein, the Intergovernmental Panel on Climate Change’s (IPCC) 4th Assessment Report left little doubt that recent observed increases in global average temperatures are ‘very likely’ the result of known recent increases in anthropogenic greenhouse gas emissions.³ The IPCC indicates that there is also evidence that as a result of this there will be an increase in the occurrence of climatic extremes and some evidence that this impacts on the

² See, eg, Steve Vanderheiden, *Atmospheric Justice: A Political Theory of Justice* (Oxford University Press, 2008) ch 5, esp 143f; also Joel Feinberg, ‘Action and Responsibility’ in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press, 1970) ch 6; and H L A Hart, ‘Postscript: Responsibility and Retribution’ in *Punishment and Responsibility* (Oxford University Press, 2008) 210.

³ Intergovernmental Panel on Climate Change, ‘Summary for Policy Makers’ in *Contributions of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 10.

occurrence of human mobility and displacement.⁴ Such constructions of responsibility are not usually that problematic and concern causality between separate phenomena or entities that involve little moral agency or attribution of fault, wrongfulness or liability. Whether they are true might be debated but they can usually be supported empirically.⁵

Responsibility in the moral sense usually requires, however, that the causal responsibility of an entity for certain actions is coupled with fault and wrongfulness inherent in such actions.⁶ To continue with the prior line of enquiry concerning responsibility in the climate change and displacement context, then, responsibility may be invoked in a different sense if one claims that the greenhouse gas emissions emanating from one or multiple entities not only impact upon climatic events and thereby upon human mobility and displacement, but that the latter ensuing from the former is somehow wrong⁷ – that it is wrong that some may lose their home and livelihoods on account of the faulty actions of others, thereby compelled, in some instances, to move. The formerly descriptive statement has become prescriptive and normative and the possibility that a particular entity (or several) is morally responsible for an act (and its consequences) is raised.⁸ That said, wrongfulness operates differently in international law, where wrongful conduct is not necessarily that which leads to harm or loss per se but usually that which arises in connection only with a failure to abide by an agreed or accepted obligation, a matter to which Section Six will pay greater attention.

⁴ Intergovernmental Panel on Climate Change, 'Summary for Policy Makers', in *Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (Cambridge University Press, 2011) 14.

⁵ Vanderheiden, above n 2, 144, 145, 146.

⁶ Ibid, 146f.

⁷ Which is not to say that the only harmful effects are concerning humans; concerns over biodiversity and species loss have also been widely noted in the literature on climate change; see, eg, Thomas E Lovejoy (ed), *Climate Change and Biodiversity* (Teri Press, 2005).

⁸ Vanderheiden, above n 2, 144, 146.

Legal notions of responsibility (in the ‘pure’ corrective justice sense), finally, are engaged in connection with the understanding that responsibility for the harmful consequences of a faulty or wrongful act entails liability and should, ultimately, necessitate corrective measures against the party (parties) which has engaged in it.⁹ Generally speaking, our statement therefore alters one final time in the following manner: displacement which ensues in connection with the greenhouse gas emissions discharged by one or multiple entities is not only wrong but entails the liability of such entities and therefore the obligation to correct the wrong (or reverse a faulty act), to compensate for it. Given the nature of international law, of course, the statement would have to read that displacement which occurs in relation to the greenhouse gasses emitted by one or multiple entities is in breach of an international obligation, and thereby entails liability to correct, a possibility dissected in the penultimate section of this chapter.

Before engaging in greater detail with the intersection of corrective justice, displacement in the climate change context and international law, the following sections will first seek to dissect whom correction might be owed to in the climate change displacement context, where affected entities may be able to seek redress, as well as the challenges of identifying responsible parties and wrongful harm, loss or damage.

3. The Loss Bearers

Identifying Loss Bearers, Casualties or Victims

Corrective justice-based claims (‘pure’ or not) inevitably require the identification of a loss bearer, casualty or victim – against whom an act leading to damage, harm or

⁹ Ibid, 146.

loss has been committed by another entity (or entities). Harm, loss or damage usually refers to ‘a disruption of or interference in [an entity’s] well-being, including damage to [its] body, psychological state, capacities to function, life plans, or resources over which we take [it] to have an entitlement.’¹⁰ The fact that climate change displacement is a complex phenomenon has already been pointed out.¹¹ Its casualties, and their losses, may therefore be difficult to delineate at times. Fundamentally, it may be possible to construe the casualties of displacement in the climate change context to consist of either affected individuals, affected communities or affected states, which also has consequences for if, how and where such entities may be able to seek redress.

A number of different ways to conceptualise casualties or loss bearers in the climate change displacement context are possible. A typology of those who will warrant a response, developed by Walter Kälin, is useful to think likewise about loss bearers, in particular as it also corresponds to several drivers of displacement discussed in Chapter Two and Three. Amongst others, Kälin’s conceptualisation includes those displaced by both rapid- and slow-onset disasters and those displaced in relation to ‘sinking islands’.¹² Chapter Two highlighted how climate change will contribute to the occurrence of natural disasters. Displacement in relation to such events may be preceded by significant personal and communal losses, though it may be possible that affected persons and communities can eventually return, a process made more likely if recuperation or reversal of losses has occurred.¹³ Losses with displacement consequences following disasters may also involve major

¹⁰ Jean Hampton, ‘Defining Wrong and Defining Rape’ in Keith Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford University Press, 1999) 118, 120.

¹¹ See ch 2 of this thesis.

¹² Walter Kälin, ‘Conceptualising Climate-Induced Displacement’ in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) 81, 85f. He further includes ‘high risk zones’ and ‘public order disturbances’ in his conceptualisation.

¹³ Also *ibid*, 85.

infrastructure, more likely of concern to the state. Secondly, previous chapters have highlighted the possibility of displacement resulting in connection with slow-onset change or degradation, for example in relation to drought and desertification or in relation to sea-level rise. In such instances, eco- and life support systems decline slowly, and with it the viability of human habitation.¹⁴ Assessing loss in relation to displacement, let alone wrongful loss as a result of climate change, may be difficult in such circumstances, as multiple factors including environmental change are very likely to interact. However, unlike areas affected by rapid-onset natural disasters, areas affected by slow-onset environmental change may ultimately be permanently unsuitable for human habitation, making displacement from such areas permanent.¹⁵ Losses associated with displacement, and their bearers, may become more obvious at that point, though loss recuperation might then only occur long after some affected persons have left. Thirdly, the notion that whole states may slowly disappear was discussed in Chapter Three. Certainly, it is possible that large areas, including some small nation states, may eventually become unsuitable at least for habitation, even if they do not physically or legally ‘disappear’.¹⁶ Preceding such losses may be a variety of impacts such as flooding, loss of agricultural production, loss of infrastructure such as roads, etc., which may require the relocation of individuals or whole communities. States, too, may therefore become victims in displacement scenarios, in that it may fall upon them to aid and support relocation in the face of threatened human habitats. An additional opportunity to think about loss bearers was discussed in Chapter Two: it outlined how the casualties of climate change-induced events may also include those who cannot move, facing on-going vulnerabilities and risks in precarious locations. Casualties here are those who should and perhaps want

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

to move, but who cannot do so. Rob Nixon has called this phenomenon ‘displacement without movement’, affecting individuals who become stuck in places increasingly devoid of the characteristics that would make them inhabitable.¹⁷

Beyond tangible losses such as homes, infrastructure and livelihoods, harm may well also be psychological and emanate from disrupted lives, broken families or communities and a sense of despair, factors well-known, for example, in relation to development-related dislocation.¹⁸

Where Can Loss Bearers Claim Redress? – Problems of Jurisdiction

It is one thing to contemplate the potential loss bearers or casualties of displacement in the climate change context. The chapter is about to turn to the question as to whether it is possible to match them with a particular perpetrator (or perpetrators) whose faulty or wrongful conduct led to their losses (or harm and damage). First, loss bearers face another hurdle worth at least a brief exploration, however – that is, jurisdiction and the availability of a legal forum where, or legal regime through which, corrective justice could be affected. The following sub-sections will briefly outline the significant obstacles faced by loss bearers¹⁹ – both states and private entities.

¹⁷ Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011) 19.

¹⁸ See, eg, Michael M Cernea and Hari Mohan Mathur (eds), *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investment and Benefit-Sharing* (Oxford University Press, 2008). More about this s 5 of this ch, which also deals with precedent for compensation of non-material losses emanating from displacement and relocation.

¹⁹ See also, eg, Andrew L Strauss, ‘Climate Change Litigation: Opening the Door to the International Court of Justice’ in William C G Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University, 2009) 334.

States

A state may want to pursue a claim against another state for the losses, harm or damage it has experienced. Concerning climate change-related claims, the United Nations Framework Convention on Climate Change (UNFCCC)²⁰ does stipulate in Article 14.2 that, in relation to disputes which may arise for Convention reasons, states parties may declare their acceptance of compulsory submission to the ICJ or arbitration. However, only Cuba, The Netherlands, Solomon Islands and Tuvalu have registered a declaration with the UNFCCC regarding Article 14.2²¹ and ‘convention reasons’ are somewhat unlikely to generate a dispute over compensation, as the Convention is not set up around that notion or possibility. Jurisdiction and other matters remain a serious challenge for many states: for example, Tuvalu raised a stir in 2002 by announcing that it was going to sue the United States over its continuous refusal to ratify the Kyoto Protocol to the UNFCCC.²² However, because it has not ratified it, the United States has no obligations under the Protocol. Furthermore, Tuvalu would have likely struggled to find an appropriate international forum, as the United States was not then (or is now) subject to compulsory jurisdiction of the International Court of Justice (ICJ).²³ No wonder, then, that no actual legal challenge materialised. Nevertheless, an inter-state

²⁰ *United Nations Framework Convention on Climate Change*, adopted 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 14(2); henceforth also ‘UNFCCC’ or ‘Convention’, as appropriate.

²¹ See *United Nations Framework Convention on Climate Change, Declarations by Parties – United Nations Framework Convention on Climate Change* (2013) <http://unfccc.int/essential_background/convention/items/5410.php>

²² *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, adopted 11 December 1997 2303 UNTS 148 (entered into force 16 February 2005); henceforth also ‘Kyoto Protocol’ or ‘Protocol’, as appropriate.

²³ Former US President Ronald Reagan revoked this in relation to the *Nicaragua Case* in 1986 - *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility)* [1984] ICJ Rep 392; see also Rebecca Elizabeth Jacobs, ‘Treading Deep Waters: Substantive Law Issues in Tuvalu’s Threat to Sue the United State in the International court of Justice’ (2005) 14 *Pacific Rim Law and Policy Journal* 103; also Strauss, above n 20 and Peggy Rodgers Kalas and Alexia Herwig, ‘Dispute Resolution under the Kyoto Protocol’ (2000) 27 *Ecology Law Quarterly* 53.

claim is not completely out of the question.²⁴ If there is agreement concerning submission of a matter to a relevant forum, international norms concerning state responsibility could conceivably be applied (a possibility that Section Six of this chapter will deal with in greater detail), as well as domestic liability principles, especially concerning such protracted questions as joint and several liability or causation.²⁵

Non-State Entities

In theory, a private loss bearer allegedly displaced or otherwise harmed by climate change and its effects could also bring a claim against a state which purportedly caused or failed to prevent that harm. Michael Faure and Andre Nollkaemper have outlined in detail how this might occur: Certainly, in relation to environmental damage or environment-related harm in general, this happens regularly in various international human rights forums²⁶ and the aforementioned Inuit petition lodged with the Inter-American Human Rights Commission raises this as a possibility also in relation to climate change harm specifically.²⁷ Nevertheless, because a claim could likely only be brought against a claimant's own state, and because extra-

²⁴ See, eg, Richard S J Tol and Roda Verheyen, 'State Responsibility and Compensation for Climate Change Damages – A Legal and Economic Assessment' (2004) 32 *Energy Policy* 1109.

²⁵ See Michael G Faure and Andre Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 43A *Stanford Journal of International Law* 123, 129 and 129; they rely also on Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co, 1927) 38-42. The authors argue that domestic principles may apply in their capacity as 'general principles of law'.

²⁶ See also, eg, Donald K Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) esp chs 4 and 5.

²⁷ Although it is important to note that the Inter-American Commission cannot require compensation or impose injunctive relief; see Donald Goldberg and Martin Wagner, 'An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change' (Paper Presented at the 10th Conference of Parties to the United Nations Framework Convention, Buenos Aires, 15 December 2004) 2.

territoriality applies in such curtailed fashion in the human rights context, applicability of international human rights law is limited.²⁸

Otherwise, Faure and Nollkaemper show how non-state loss bearers may be able to bring a claim against a state under domestic tort law. Although unlikely, especially in the context of displacement, and long the subject of severe restrictions, the authors note that legal developments in at least some places now enable private parties to raise tort-like claims against a state, making this a possibility also in the climate change context.²⁹ Whether such claims, or any of the tort-based options to be discussed below, for that matter, are permitted or not, however, is not regulated by international law.³⁰

A private entity or entities harmed by the effects of climate change may bring a claim against another private party. Considering issues of causality, it may be difficult to envision that a court or tribunal anywhere will find that the emissions associated with a single or individualisable entity (for example, a company, or even a conglomerate of businesses) have been substantial enough, or are causally-related enough, to cause harm, damage or loss in another entity (especially such that it leads to displacement).³¹ Nevertheless, it is important to consider briefly the possibility of claims between private parties. Faure and Nollkaemper note how those who suffer climate change-related harm or losses would likely have to bring a suit in a defendant's state, as domestic conflict of law rules will usually stipulate that only the

²⁸ See ch3, s 7 of this thesis; also Faure and Nollkaemper, above n 25, 130.

²⁹ Ibid. They rely upon Walter van Gerven, Jeremy Lever and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart Publishing, 2000) 358-394. Also various entries in Michael Faure and Marjan Peeters (eds), *Climate Change Liability* (Edward Elgar Publishing, 2011).

³⁰ Faure and Nollkaemper, above n 25, 132.

³¹ Ch 2 of this thesis dealt with the difficult causality issues involved in climate change-induced displacement; s 4 of this chapter will deal with causality issues in relation to potential perpetrators of climate change harm or losses.

legal system there is eligible to consider it.³² Here, several barriers emerge: First, there are questions of access.³³ Only some legal systems, foremost amongst them the United States (US), provide relatively expansive access to foreign plaintiffs.³⁴ International law also provides for equitable alien access to courts in the state where harm originated, at least where transboundary harm from ultra-hazardous activities is concerned.³⁵ Secondly, questions will also arise as to whether a claimant can find a relevant regime.³⁶ In the case of the United States, victims of damage caused by US entities overseas sometimes take advantage of tort provisions only available there.³⁷ The *Alien Tort Statute*, in particular, is often highlighted as one possible avenue in the climate change harm context.³⁸ However, conceptual uncertainties relating to legal constructs such as ‘public nuisance’, ‘proximate cause’, ‘pre-emption’ and ‘proof of damages’ may provide many challenges in claims relating to climate change in domestic legal systems.³⁹ Challenging again will be to find a regime

³² Faure and Nollkaemper, above n 25, 136.

³³ Ibid, 134.

³⁴ Faure and Nollkaemper cite US ‘diversity jurisdiction’; above n 25, 135.

³⁵ Faure and Nollkaemper, above n 25, 135. See Principle 6 (2) of the International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, in *Report of the International Law Commission on the Work of its Fifty-Eights Session*, UN Doc A/61/10 (1 October 2006): ‘Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.’

³⁶ Faure and Nollkaemper, above n 25, 136.

³⁷ Ibid, 135

³⁸ *Alien Tort Statute*, 28 USC, para 1350; also known as the *Alien Tort Claims Act* (ATCA), which stipulates that ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’ For assessments of the ATCA’s relevance to global warming-related litigation, see also Rosemary Reed, ‘Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress under the Alien Tort Claims Act?’ (2002) 11 *Pacific Rim Law and Policy Journal* 399 and Mini Kaur, ‘Global Warming Litigation Under the Alien Tort Claims Act: ‘What *Sosa v Alvarez Machain* and its Progeny Mean for Indigenous Arctic Communities’ (2006) 13 *Washington and Lee Journal of Civil Rights and Social Justice* 155. For case law, note the *Sosa* and *Kiobel* decisions: *Sosa v Alvarez-Machain*, 542 US 692 (2004) and *Kiobel v Royal Dutch Petroleum*, 185 L Ed 2d 671. *Sosa* spelled out that the *Alien Tort Statute* (ATS) does permit claims based on customary international law; *Kiobel*, however, has put in doubt the extra-territorial application of the Statute. Some have therefore predicted the demise of the Alien Tort Statute; see, eg, Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation* (17 April 2013) <<http://opinio.juris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/>>.

³⁹ See Daniel A Farber, ‘Basic Compensation for Victims of Climate Change’ (2007) 155 *Pennsylvania Law Review* 1605, 1615.

relevant to displacement. To conclude, then, although legal options for loss bearers (both individuals and collectives) to pursue claims in relation to climate change harms or losses exist in theory, in practice they may be of extremely limited relevance, in particular in the displacement context.

Final Words

It is important to remember that corrective justice is meant to support correction where it takes place *after* an act leading to harm, damage or loss has occurred. Although climate change undoubtedly contributes to increasing the risk of displacement, and states are also obliged to act with precaution, even in the face of scientific uncertainty about climate change and its effects, it is difficult to construe an increase in risk alone as specifically harmful in the corrective justice sense.⁴⁰ Of course, because corrective justice raises the possibility of compensation, it may act as a deterrent and thereby reduce risk. But an actual claim based in corrective justice could likely only materialise when potential loss bearers have become actual loss bearers. Even where loss bearers have materialised, jurisdictional and other obstacles in their pursuit of corrective justice may remain significant. Even though there can be little doubt that many will be harmed by the effects of climate change, including through the loss of home, livelihood and infrastructure, which may compel human displacement, finding a forum where affected persons or states could seek correction, or a legal regime by which this could be affected, may prove challenging.

⁴⁰ Although Roda Verheyen and Peter Roderick show how, under the ‘no harm rule’, states do have *duties of prevention* in relation to environmental harm; see Roda Verheyen and Peter Roderick, ‘Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage’ (Report for World Wildlife Fund – UK, 2009) 15f. And note the precautionary principle; eg, in the United Nations Framework Convention on Climate Change it reads: ‘The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures’; art 3(3).

Challenging again may be that at least ‘pure’ corrective justice is based on the premise that a victim and its losses are causally related to a *specific* perpetrator (or several) *and* the faulty acts engaged in by the latter, for which compensation is due by *that* entity. As one court found in a global warming lawsuit in the United States, however, climate change is ‘too general, too unsubstantiated, too unlikely to be caused by [a specific] defendant’s conduct’.⁴¹ And yet, also in the domestic context, Vincent Oleszkiewicz and Douglas Sanders have argued that difficult causal hurdles may eventually be overcome:

Past litigation in the U.S. courts against industries such as the tobacco industry and asbestos industry proceeded cautiously at first. Plaintiffs adapted to defense arguments, science caught up with the causation arguments and discovery often resulted in unfavourable documents being produced [...]. Causation remains a big challenge for potential plaintiffs to overcome in climate change litigation [...]. [P]laintiffs and their attorneys will draw on the same lessons discussed above to pursue claims and will reach a point where they can obtain significant discovery from defendants. Lawsuits do not have to be successful on the merits before they cause a defendant to spend significant time and resources.⁴²

The following section will engage with the difficult questions of causality and scientific uncertainty raised by anthropogenic climate change, thereby seeking to investigate whether the particular perpetrator necessary for a ‘pure’ corrective claim in the displacement context can be isolated.

4. The Perpetrator(s)

Identifying a perpetrator or perpetrators in relation to displacement in the climate change context in the ‘pure’ corrective justice sense means that one or several

⁴¹ *Center for Biological Diversity v Abraham*, 218 F Supp 2nd 1143 (ND Cal, 2002). Although Kevin Healy and Jeffrey Tapick, for example, argue that, at least in domestic settings, many similar hurdles have been surmounted, for example in tobacco cases in the 1990s in the United States; see J Kevin Healey and Jeffrey M Tapick, ‘Climate Change: It’s Not Just a Policy Issue for Corporate Council – It’s a Legal Problem’ (2004) 29 *Columbia Journal of Environmental Law* 89, 102.

⁴² Vincent S Oleszkiewicz and Douglas B Sanders, ‘The Advent of Climate Change Litigation Against Corporate Defendants’ (2005) 27 *International Environmental Report* 936, 937.

entities would have to be isolated whose actions have been faulty, that is harmful, and likely also wrongful, that is, not innocent,⁴³ and specifically causally related to the possible damage, harm and losses outlined in relation to the victims of displacement. Disaggregating this is complicated because unambiguous causal chains do not necessarily exist – neither in relation to climate change per se, nor to displacement that arises in connection with it more specifically⁴⁴ – and knowledge of greenhouse gas emission's harmful consequences is relatively recent, one of many obstacles to establishing wrongfulness in relation to a significant share of emissions (those emitted when emitters could still claim innocence). Several issues deserve contemplation: is there a single entity, or several; is there a temporal dimension by which to consider the perpetrator (or perpetrators) and its conduct; is it only harm which matters or also benefit which has accrued? These will now be considered.

The Perpetrator(s): Individual or Collective?

Identifying a particular perpetrator (or several) who has causally and morally acted wrongly in the climate change displacement context is complex. There is the question of if and how human activity has caused climate change in the first place, although that climate change is anthropogenic is no longer doubted except by a small number of sceptics. Secondly, there are the intricacies of establishing how climate change contributes to the occurrence of certain climatic events or phenomena and how these then in turn impact upon displacement. There is some agreement that climate change effects contribute to human mobility,⁴⁵ but using this as the basis for arriving at a conclusive perpetrator (or even several) – a responsible entity (or several) which has acted wrongfully and which is causally related to those who

⁴³ See, eg, Hampton, above n 10, 121.

⁴⁴ See ch 2 of this thesis.

⁴⁵ See ch 2 of this thesis.

experience displacement – is not easy. At least in theory, it is possible to consider different actors or entities that at least contribute to climate change through their greenhouse gas emissions and thereby may be responsible (certainly causally and at least partially) for contributing to its ill effects, including displacement.⁴⁶ This includes both individual and collective entities: persons, companies, states, geopolitical groupings (e.g. the developed world), even certain generations (usually considered to be past ones and/or the current one). The UNFCCC and Kyoto Protocol, by emphasising national responsibility in relation to the principle of ‘common but differentiated responsibility’⁴⁷ stipulate that it ought to be ‘the developed country Parties [which] should take the lead in combating climate change and the adverse effects thereof.’⁴⁸ This does not, however, diminish the elusive nature of allocating or enforcing responsibilities in relation to the multiple harms which emanate from climate change.⁴⁹ Corrective justice, certainly in its ‘pure’ form, envisions concretely that those who have specifically caused harm or damage correct it.⁵⁰ Concerning harm related to the environment this understanding is most notably enshrined in the ‘polluter pays’ principle, which holds that those who pollute and thereby cause harm or damage should meet the costs related to ceasing the polluting activity and those related to any ill effects which have arisen. It also holds that potential polluters meet the costs of pollution control and prevention in the first place.⁵¹ A comprehensive study of the principle, published by the Organisation for

⁴⁶ See, eg, Simon Caney, ‘Cosmopolitan Justice, Responsibility, and Global Climate Change’ (2005) 18 *Leiden Journal of International Law* 747 and Edward A Page, ‘Distributing the Burdens of Climate Change’ (2008) 17 *Environmental Politics* 556.

⁴⁷ See *United Nations Framework Convention on Climate Change*, art 3(1), also art 4(1) and Kyoto Protocol, art 10.

⁴⁸ *United Nations Framework Convention on Climate Change*, art 3(1) [italics by thesis author].

⁴⁹ Page, above n 46, 557; although it is an important statement supporting distributive justice, as ch 7 of this thesis will argue.

⁵⁰ See ch 4 of this thesis.

⁵¹ Organisation for Economic Co-operation and Development, ‘The Polluter Pays Principle: Definition, Analysis and Implementation’ (2008) 15.

Economic Co-operation and Development (OECD) in 2008, lists numerous case studies where the principle has found application in the national context.⁵²

Importantly, in the international realm the principle forms the backbone of Principle 16 of the Rio Declaration.⁵³ It has also surfaced in the international climate change negotiations and IPCC reports. In its Third Assessment Report, for example, the IPCC highlighted it as possibly relevant in the climate change context:

[T]he polluter-pays principle, an economic principle that polluters should bear the cost of abatement without subsidy, is based upon fault or, alternatively, upon an amoral rationale of causal responsibility, or simply that the assignment of burden creates an incentive to not pollute.⁵⁴

Implementing a compensatory polluter pays principle was also suggested in the negotiations leading up to the Kyoto Protocol. Instead, the aforementioned ‘common but differentiated responsibilities’ concept emerged, which does not construct responsibility as a matter of compensation.⁵⁵ An early Brazilian proposal had envisioned that major polluting countries must contribute to a *compensatory* Clean Development Fund commensurate with their responsibility for emissions, to be used to pay for adaptation measures in poorer countries. However, the Kyoto Protocol enshrined as one of its ‘flexible’ instruments a Clean Development Mechanism (CDM) which is not compensatory or based on direct responsibility.⁵⁶ Attempts to apply the polluter pays principle to responsibilities arising in connection with

⁵² Ibid, 93ff.

⁵³ *Rio Declaration on Environment and Development*, proclaimed 3-14 June 1992, UN Doc A/Conf.151/26 (Vol I) (12 August 1992). For a useful outline of the emergence and early history of the principle, please see H C Bugge, ‘The Principles of Polluter Pays in Economics and Law’ in E Eide and R van der Bergh (eds), *Law and Economics of the Environment* (Juridisk Forlag, 1996).

⁵⁴ Intergovernmental Panel on Climate Change, ‘Decision-making Frameworks’ in *Contributions of Working Group III to the Third Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2001) 668, 670.

⁵⁵ See Vanderheiden, above n 2, 231. Note, however, developments concerning a loss and damage mechanism under the umbrella of the UNFCCC, discussed in the following chapter of this thesis.

⁵⁶ Ibid; see also Emilio L La Rovere, Laura Valente de Macedo and Kevin Baumert, ‘The Brazilian Proposal on Relative Responsibility for Global Warming’ in Kevin A Baumert, Odile Blanchard, Silvia Llosa and James F Perkaus (eds), *Building on the Kyoto Protocol: Options for Protecting the Climate* (World Institute, 2002) 157, 159. Though note that although not compensatory, the CDM is the main source of contributions for the UNFCCC Adaptation Fund, established in 2007; further discussion in ch 7 of this thesis

anthropogenic climate change nevertheless abound. Simon Caney, prominently, has sought to tease out its relevance in this context.⁵⁷

Fundamentally, the polluter pays principle raises important questions about *who*, specifically, is the entity ‘polluting’, or in this case emitting greenhouse gases, so excessively that it causes harm. It is vital to remember that, in line with ‘pure’ corrective justice, the principle is usually applicable to an individualisable, single entity, for example, a person or a company.⁵⁸ Anthropogenic climate change seems to indeed derive from small, separate acts engaged in by individuals or individual entities. However, only where those acts are combined do detrimental (harmful) impacts, including in relation to displacement, arise.⁵⁹ This may make individuals (or individualisable entities, such as certain companies) responsible in the aforementioned causal sense to varying degrees, but does this also make them somehow morally culpable or legally liable?⁶⁰ The well-known *Stern Review of Economics and Climate Change*, released in 2006, highlighted that in the last hundred years, or so, human activity has been behind the release of many billions of tonnes of carbon.⁶¹ We also know that greenhouse gas concentrations in the atmosphere are now at the 400ppm CO₂-equivalency mark,⁶² alleged to be beyond a

⁵⁷ Caney, above n 46; also Henry Shue has argued that the historical responsibility of wealthy states means they should bear also the extra-territorial cost and burdens associated with climate change; see Henry Shue, ‘Global Environment and International Inequality’ (1999) 75 *International Affairs* 533; Caney notes that ‘burdens’ can be divided into mitigation and adaptation burdens; Caney, above n 46, 751f; this thesis is concerned more with the latter as it is more directly concerned with the potential ill effects of climate change.

⁵⁸ Simon Caney makes this point and then distinguishes between a micro-version of the polluter pays principle (actor x causes pollution) and a macro-version of it (actors x, y and z causing pollution), only the latter of which provides a useful conceptual framework in the climate change context; see Caney, above n 46, 753f.

⁵⁹ Vanderheiden, above n 2, 159f.

⁶⁰ Ibid, 160.

⁶¹ Nicholas Stern, *The Economics of Climate Change: Stern Review* (Cambridge University Press, 2007) 221; henceforth also ‘Stern Review’.

⁶² Earth Systems Laboratory, *Trends in Atmospheric Carbon Dioxide* (2013) <<http://www.esrl.noaa.gov/gmd/ccgg/trends/>>; it continues to grow at a rate of approximately 2 to 4ppm every year.

level considered safe or harmless for humans and the planet.⁶³ However, deriving specific moral or legal responsibility from this in relation to a specific actor remains quite difficult. Some of these contributions are the result of ordinary human activity not, at least until recently, known or suspected⁶⁴ to induce harm.⁶⁵ It seems therefore that though able to affect people detrimentally (including through displacement), climate change may generate ‘some bad outcomes [which, however,] appear to have been caused by entirely blameless acts.’⁶⁶ No individual act is necessarily faulty or wrong: none such act alone has caused harm and none was intended or known to do so – until recently.⁶⁷

Should we therefore disregard small individual contributions as harmless, or not wrongful? Steve Vanderheiden has shown how noted British philosopher Derek Parfit would warn against this as a ‘mistake in moral mathematics’, leading to flawed assumptions as to the harmless nature of separate acts and therefore their continuing benevolent nature if committed in the collective.⁶⁸ Parfit, in fact, has urged abandonment of the view that an individual act is neither right nor wrong if its effects are imperceptible individually but harmful when committed in the collective, ‘in particularly when the stakes are very high’⁶⁹ (as they arguably are with climate change).

⁶³ Some scientists have stated that atmospheric CO₂ concentrations must be kept below 350ppm, in order to remain at safe levels; see, eg, Jim Hansen et al, ‘Target Atmospheric CO₂: Where Should Humanity Aim?’ (2008) 2 *Open Atmospheric Science Journal* 217. CO₂ refers to carbon dioxide.

⁶⁴ Arguably, not until publication of the IPCC’s first Assessment Report in 1990; the Kyoto Protocol also seems to take just this approach by disregarding pre-1990 emission levels; see Vanderheiden, above n 2, 231. Regarding the ethical issues this raises, see, eg, Paul Baer, ‘Equity, Greenhouse Gas Emissions, and Global Common Resources’ in Stephen H Schneider, Armin Rosenkranz and John O Niles (eds), *Climate Change Policy: A Survey* (Island Press, 2002) 393.

⁶⁵ Vanderheiden, above n 2, 160. According to Caney, an ‘ignorance excuse’ may therefore be valid; see Caney, above n 46, 761ff.

⁶⁶ Vanderheiden, above n 2, 160.

⁶⁷ Ibid.

⁶⁸ Derek Parfit, *Persons and Reasons* (Clarendon Press, 1984) 75. considered, eg, in Steve Vanderheiden, ‘Climate Change and the Challenge of Moral Responsibility’ (2006) *Ethics and Life Sciences* 85 and Vanderheiden, above n 2, 160ff.

⁶⁹ Parfit, above n 68, 75 and 82 and Vanderheiden, above n 2, 161, 164, 165ff.

Domestic tort law, undoubtedly, has long found ways to deal with situations where individual polluters have seemingly only collectively contributed to an environmental issue or problem:

The rule that has evolved is that, at least where both [or several] causes involve comparable blameworthiness, both actors are liable, even though the conduct of either one was not a *sine qua non* of the injury because of the conduct of the other. There is no reason why a polluter should be insulated from responsibility in a case where a traditional tortfeasor would not be.⁷⁰

Relying on principles of moral philosophy, courts have argued, in line with Parfit, that polluters cannot be excused if their individual action is seemingly not faulty:

Take the philosophers' example [...] of the kitchen with a light switch at each end. When two people simultaneously flip both switches on, the light goes on. Neither person's conduct is a *sine qua non*, because the light would have gone on anyway. Neither individual's conduct made a difference to the outcome. [This] analysis would compel the conclusion that neither person caused the light to go on.

[This] argument that liability can only attach to conduct that is a *sine qua non* of the harm, even for causally overdetermined harm, cannot be right, as the kitchen light hypothetical case shows. The problem with [this] argument is that where the result is overdetermined, each person's argument is as strong as the other's identical argument. If we accept one person's argument that he did not cause the light to go on, then we have to accept the identical and equally valid argument of the other person that he did not cause the light to go on. Each accurately points out that his switching the light on was not a *sine qua non* of its going on. It is true that the light would have gone on anyway because of the other person's conduct. If conduct had to be a *sine qua non* even for this overdetermined result, then neither person's conduct caused the light to go on. But the light went on. And it did so by human agency, not spontaneously. So the conclusion that argument compels, that no one caused the light to go on, is false. Because the correct answer has to be the same for the two individuals, by eliminating the false answer, we have left only one possible answer which must be true: each of the two persons caused the light to go on.⁷¹

Transferring such arguments to harm arising out of greenhouse gas emissions, even where harmful conduct seemingly arises only where individual emitters' actions are combined, all of them have made a causal contribution and all of them may therefore, in some way, be responsible and held responsible.⁷² In the context of

⁷⁰ *Boeing Company v Cascade Corporation*, 207 FSupp 3d 1177, 1183 (9th Cir, 2000); in Daniel A Farber, 'The Case for Climate Change Compensation: Justice for Climate Change Victims in a Complex World' (2008) *Utah Law Review* 377, 391.

⁷¹ *Ibid*, 1184-85.

⁷² Farber, above n 70, 390ff.

company shareholders, arguments supporting individual responsibility in the context of a collective are sometimes made:

Investors who purchase shares in corporations, or who authorize others to purchase shares on their behalf, as through a mutual fund, do have control over their exposure to the risk that the enterprise's activities will go awry. Their intentional participation in the collective endeavour does not make them blameworthy – they have done nothing wrong by purchasing stock, nor have they failed in any way in their duties as shareholders (whatever those might be). But it does render them accountable in the domain of repair for the company's accidents, when the company cannot meet its warranted claims.⁷³

Arguing that individuals or individual entities, certainly via the collective social, political and economic arrangements in which they participate, may be responsible, and held responsible, for victimising others through harm emanating from their individual emissions does not therefore seem entirely out of the question.

At the individual level, responsibility for anthropogenic climate change is in any case not denied.⁷⁴ Research has repeatedly shown the extent of people's acceptance certainly of individual causal responsibility for climate change.⁷⁵ For example, Jennifer Kent cites an Accountability and Consumers International Survey in the United States and United Kingdom, which found that 66 percent of respondents accepted that they are personally responsible for contributing to global warming.⁷⁶ A similar survey in Australia found that 81 percent of respondents there acknowledged that taking personal responsibility to combat global warming is important.⁷⁷

However, Pidgeon et al have noted the

⁷³ Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2000) 246; quoted in Farber, above n 70, 398.

⁷⁴ See, eg, Jennifer Kent, 'Individualized Responsibility and Climate Change: "If Climate Protection becomes Everyone's Responsibility, Does it End up Being No-one's?"' (2009) 1 *Cosmopolitan Civil Societies Journal* 132.

⁷⁵ Ibid, 141.

⁷⁶ Ibid. See Accountability and Consumers International, *What Assures Consumers on Climate Change? Switching on Citizen Power* (2007), 9 <<http://www.accountability.org/images/content/2/1/211/What%20Assures%20Consumers%20on%20Climate%20Change.pdf>>.

⁷⁷ Net Balance Foundation, Accountability and LRQA, *What Assures Consumers in Australia on Climate Change? Switching on Citizen's Power (2008 Update – Australian Survey)* (2008), 11 <<http://www.accountability.org/images/content/0/6/061/What%20Assures%20Consumers%20in%20Australia%20on%20Climate%20Change.pdf>>.

discrepancy between individuals' intentions to mitigate and their actual behaviours; while people indicate frequently that they are willing to [...] save energy in the home, only a minority of people do take measures to reduce their energy consumption for environmental reasons.⁷⁸

Perhaps people have not received enough encouragement to change their behaviour and it should be those who could regulate behaviour who should be held (morally and legally) responsible? The concept of vicarious liability, whereby the bearers of causal responsibility are decoupled from those who incur liability, is of course a long-familiar concept in many collective settings, including the military and places of employment.⁷⁹ In the *Trail Smelter Arbitration*, a landmark international case concerning transboundary pollution, it was also held that '[a] State owes at all times the duty to protect other states against injurious acts by individuals from within its jurisdiction'.⁸⁰

States, of course, are also the primary subjects of international law, with which this thesis is concerned. Perhaps they ought to be the responsible entity into which all other options collapse and international law then the framework which facilitates allocation of responsibility for harm and losses. The standard suggestion in the climate change context has indeed often been that it is certain individual countries which ought to bear responsibility for harm and damage resulting from excessive emissions,⁸¹ and to compensate for it. The obstacle here, however, is that compensation derived from a collective may involve a 'blanket assessment of group

⁷⁸ Nick F Pidgeon, Irene Lorenzoni and Wouter Poortinga, 'Climate Change or Nuclear Power – No Thanks! A Quantitative Study of Public Perceptions and Risk Framing in Britain' (2008) 18 *Global Environmental Change* 69, 73; quoted in Kent, above n 74, 142.

⁷⁹ See, eg, Vanderheiden, above n 2, 173, 177. Although note some controversy around this in relation to military activity, particularly in relation to international criminal law and the notion of joint criminal enterprise; see, eg, Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 *Journal of International Criminal Justice* 159; also the judgement in *Tadić* [IT-94-1], Appeals Chamber, 15 July 1999.

⁸⁰ *Trail Smelter Arbitration (United States v Canada)* [1941] III RIAA 1905, 1963

⁸¹ See, Caney, above n 46, 754; Shue, above n 57; Eric Neumayer, 'In Defense of Historical Accountability for Greenhouse Gas Emissions' (2000) 33 *Ecological Economics* 185. Though Eric Posner and David Weisbach rigorously discount the idea of collective national responsibility; see Eric Posner and David Weisbach, *Climate Change Justice* (Princeton University Press, 2010).

liability', ignoring the fact that burdens are thereby allocated equally to individual group members with often very different (sometimes non-existent) levels of contribution to harm.⁸² This is problematic for 'pure' corrective justice, which demands that only specifically-responsible entities are liable for correction.

This issue has been highlighted prominently by Eric Posner and Cass Sunstein, who argued in a 2007 working paper that 'the consequence of tort-like thinking would be to force many people who have not acted wrongfully to provide a remedy to many people who have not been victimized'⁸³ and that any 'crude state-to-state remediation scheme results in innocents being punished and non-victims being compensated'.⁸⁴ And indeed, some individuals may well have curbed their personal contributions to greenhouse gas emissions and would be unduly punished or burdened by an interstate compensation scheme (for example, through the imposition of higher taxes in the harming nation).⁸⁵ However, both Daniel Farber and Steve Vanderheiden have pointed out a fallacy with Posner and Sunstein's argument: it does not consider the individual as citizen and voter.⁸⁶ Climate change, they argue is also the result of government policy making action or inaction, which can be influenced by individuals in their capacity as citizens. With many governments at least minimally answerable to their citizenry, collective responsibility can therefore not be entirely discounted if one thinks of individuals also as citizens and voters and therefore their contribution to the climate change problem in that capacity.⁸⁷ Some may well have taken political (as well as consumer) action that favours greenhouse gas reductions, but this may not prevent them from also bearing some of the

⁸² Vanderheiden, above n 2, 167f.

⁸³ Eric Posner and Cass R Sunstein, 'Climate Change Justice' (University of Chicago, Public Law Working Paper 177, 2007) 21, 25.

⁸⁴ Ibid, 25.

⁸⁵ Farber, above n 70, 399.

⁸⁶ Ibid and Vanderheiden, above n 2, 177f.

⁸⁷ Farber, above n 70, 398 and Vanderheiden, above n 2, 176, 205.

compensation burdens for climate change harm.⁸⁸ A case in point may be potentially analogous compensation schemes: For example, the United Nations Compensation Scheme (UNCS), established in the aftermath of the first Iraq War to administer claims against that country, awarded billions of dollars in over one hundred successful claims.⁸⁹ Vanderheiden argues that with such schemes citizens not supportive of war or invasion are usually also inevitably burdened.⁹⁰ In any case, a nation's tax system, which will likely be the source of raising the necessary funds to compensate the casualties of climate change harm at the inter-state level, will most certainly provide for apportioning of burdens that is just in a rudimentary fashion: wealthier citizens consume more, thereby generating more greenhouse gases through their consumption choices, but they also usually pay more in taxes.⁹¹

The fact that climate change harms are the result of greenhouse gas emissions originating from more than one state (and its citizens) is also not necessarily a hindrance to holding individual states responsible under international law.⁹² The *Corfu Channel* case is illustrative here: it suggests that Albania's obligations (to warn of mines in Albanian waters) prevailed despite the simultaneous responsibility of a third state (Yugoslavia).⁹³ In a separate opinion in the *Oil Platforms* case,⁹⁴ Judge Simma furthermore sought to suggest that the principle of joint and several liability, more familiar from domestic legal systems, could be incorporated into

⁸⁸ Farber, above n 70, 398 and Vanderheiden, above n 2, 169ff.

⁸⁹ The UN Security Council held that Iraq 'is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'; see United Nations Security Council, Res 687, UN Doc 5/RES/687 (3 April 1991) para 16; for a detailed analysis, see Hans van Houtte, 'The United Nations Compensation Commission' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press, 2006). Farber also introduces this and other relevant compensation schemes; see Farber, above n 39, 1619ff.

⁹⁰ See Vanderheiden, above n 2, 174f.

⁹¹ Farber, above n 70, 399.

⁹² Faure and Nollkaemper, above n 25, 166ff.

⁹³ *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, 16-18, 36; also Faure and Nollkaemper, above n 25, 167.

⁹⁴ *Oil Platforms (Iran v United States)* [2003] ICJ Rep 90, Separate Opinion of Judge Simma.

international law.⁹⁵ The ILC's Articles on State Responsibility also stipulate in Article 47 that the responsibility of separate states may be invoked in instances 'where several states are responsible for the same internationally wrongful act'. However, whether climate change harm could ever be considered to result from the *same* internationally wrongful act might be doubtful. What is harmful, after all, are aggregate separate acts. What constitutes an internationally wrongful act in the first place will be the subject of investigation in Section Six of this chapter.

The Perpetrator(s): Past, Current or Future?

The idea that it is certain states which should correct harm and damage inflicted by climate change is intuitively appealing – only when considering emissions at the level of bigger collectives such as states (particularly those with very high emissions) could it be argued that total emissions quantitatively amount to something harmful and even wrongful. Certainly, measuring the contributions of each country to overall greenhouse gas emissions is a process which has become more reliable; allocating at least causal responsibility for emissions therefore seems possible at that level.⁹⁶ However, there are several other, complicating factors to consider which raise doubts about the moral or legal responsibility of states. In their aforementioned working paper, for example, Posner and Sunstein pose the following, which is relevant when considering the problem from an individualist or collective perspective:

The current stock of greenhouse gases in the atmosphere is due to the behaviour of people living in the past. Much of it is due to the behaviour of people who are dead. The basic problem for corrective justice is that dead wrongdoers cannot be punished or held responsible for their behaviour, or forced to compensate those they have harmed. Holding Americans today responsible for the activities of their ancestors is not fair or reasonable on corrective justice grounds [...].⁹⁷

⁹⁵ Faure and Nollkaemper, above n 25, 167.

⁹⁶ See Page, above n 46, 557; also Vanderheiden, above n 2, 181.

⁹⁷ Posner and Sunstein, above n 83, 27.

In a later version of their paper, they similarly argue that corrective justice is difficult to apply in relation to climate change because ‘many of the relevant actors are long dead’ and ‘much of the contribution [to climate change harm] was probably due to people who died years ago’.⁹⁸ This is an understandable sentiment and, at first glance, supported by science. Climate change is, after all, not the result of human-induced emissions of any particular time or place.⁹⁹ Greenhouse gases act as ‘stock pollutants’ which alter the climate on account of cumulative accumulation over long periods of time.¹⁰⁰ On the other hand, annual outputs in any given year contribute no more than four percent, which means historic emissions would have to be accounted for in developing responsibility models,¹⁰¹ a notion Posner and Sunstein challenge.

Nevertheless, relying on greenhouse gas emissions data concerning the United States, Farber shows that although CO₂ emissions between 1990 and 2004 amounted to only 25.5 percent of total emissions from that country, those emitted between 1970 and 2004 amounted to 53.5 percent of total emission and, going back further, those emitted between 1950 and 2004 amounted to 72.5 percent of total emissions. He goes on to argue that, with the majority of contemporary Americans alive during the latter time frame, it is flawed to argue that emissions somehow amount to a ‘historical phenomenon’.¹⁰² Furthermore, a country such as the United States has not in the past hesitated to compensate for harm with a historical dimension in the domestic context: For example, USD 800 million in compensation were paid after the second World War to Native Americans for improper seizure of their land as far back as the American Revolution in the 18th century. Millions in compensation were

⁹⁸ Eric A Posner and Cass R Sunstein, ‘Climate Change Justice’ (2008) 96 *Georgetown Law Journal* 1565, 1597.

⁹⁹ Page, above n 46, 558.

¹⁰⁰ See Ian W H Parry, ‘Fiscal Interactions and the Case for Carbon Tax over Grandfathered Carbon Permits’ (2003) 19 *Oxford Review of Economic Policy* 385, 396; also Page, above 47, 558.

¹⁰¹ Page, above n 46, 558.

¹⁰² Farber, above n 70, 395-396.

also paid in the 1990s in connection with the hundreds of poor Alabama sharecroppers who were denied treatment for syphilis, even though a cure had become available (penicillin), as part of a government-sponsored experiment between 1932 and 1972.¹⁰³

However, historical outputs present several other challenges: state boundaries have not remained the same since anthropogenic greenhouse gas discharges began to accumulate.¹⁰⁴ Eric Neumayer suggests that to tackle this issue, responsibility models should only consider emissions post-1990, when national boundaries, he argues, became largely established as they are today.¹⁰⁵ But even if this was true, historical responsibility for emissions remains difficult to construe on account of the fact that emitters did not know, until fairly recently, that their actions might have harmful consequences. This knowledge, some argue, could likely not have been expected until 1990 and the publication of the First Assessment Report by the IPCC, which only then warned comprehensively of the likely detrimental consequences of continued unfettered emissions.¹⁰⁶ Perhaps some form of discounting for moral

¹⁰³ Farber reviews these, and many other potentially analogous compensation schemes; see Farber, above n 39, 1633, and throughout. For further details, see also Saul Levmore, 'Privatizing Reparations' (2004) 84 *Boston University Law Review* 1291, 1303; also Eric Yamamoto, 'Racial Reparations: Japanese American Redress and African American Claims' (1998) 40 *Boston College Law Review* 477. Although note that the issue of reparations and compensation have remained unresolved with such protracted issues such as slavery; see, eg, Eric A Posner and Adrian Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 *Columbia Law Review* 689 and Saul Levmore, 'Changes, Anticipation and Reparations' (1999) 99 *Columbia Law Review* 1657.

¹⁰⁴ See, eg, Neumayer, above n 81, 196, and Page, above n 46, 559.

¹⁰⁵ See Neumayer, above n 81, 189. Page, however, highlights that significant alterations to boundaries have occurred since 1900; see Page, above n 46, 559.

¹⁰⁶ See, eg, Page, above n 46, 560; also Vanderheiden, above n 2, 189f. Although note Svante Arrhenius, 'On the Influence of Carbonic Acid in the Air upon the Temperature on the Ground' (1896) 41 *The London, Edinburgh, and Dublin Philosophical Magazine and Journal of Science* 237. He is concerned about the effects of human CO₂ emissions in 1896. And note G S Callendar in 1938: 'As man is now changing the composition of the atmosphere at a rate which must be very exceptional on the geological time scale, it is natural to seek for the probably effects of such a change. From the best laboratory observations it appears that the principal result of increasing atmospheric carbon dioxide [...] would be a gradual increase in the mean temperature of the colder regions of the Earth'; in G S Callendar, 'The Artificial Production of Carbon Dioxide and Its Influence on Temperature' (1938) 64 *Quarterly Journal of the Royal Meteorological Society* 223.

responsibility is therefore vital.¹⁰⁷ Certainly, *wrongful* (not innocent) action is not so easily construed, certainly not until recently, when considering historical dimensions.

Complicating matters further is that contributions to greenhouse gas emissions levels keep shifting over time. For example, at 20.6 percent of global annual emissions, a 2005 study determined that the United States was the largest emitter of greenhouse gases at the beginning of the century¹⁰⁸ (and had been for a long time prior). However, China now emits more carbon dioxide than all of North America combined¹⁰⁹ and developing countries (if China and India are included) as a whole have, in recent years, surpassed developed countries in annual greenhouse gas emissions,¹¹⁰ whilst nevertheless simultaneously suffering, or expecting to suffer, many of its adverse consequences, including displacement.

International law, too, raises issues in relation to responsibility for the historic emissions of states.¹¹¹ Article 13 of the Articles on State Responsibility, for example, affirms: ‘An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs’.¹¹² In the *Island of Palmas* arbitration, Judge Huber similarly found that ‘a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in

¹⁰⁷ Arguing for this is Page, above n 46, 559. For more on discounting in the climate change harm context, see also Simon Caney, ‘Climate Change and the Future: Discounting for Time, Wealth, and Risk’ (2009) 40 *Journal of Social Philosophy* 163. For views contrary to discounting, see, eg, Neumayer, above n 81, 18.

¹⁰⁸ See Kevin Baumert, Tim Herzog and Jonathan Pershing, ‘Navigating the Numbers: Greenhouse Gas Data and International Climate Policy’ (World Resources Institute, Washington, 2005) 110; data relied upon is largely from 2000.

¹⁰⁹ United States, *Energy Information Administration, International Energy Statistics* (2013) <<http://www.eia.gov/cfapps/ipdbproject/iedindex3.cfm?tid=90&pid=44&aid=8&cid=r1,r7,&syid=2011&eyid=2011&unit=MMTCD>>.

¹¹⁰ See Ben Webster, ‘Developing Nations Outstrip Rich on Greenhouse Gases’, *The Times*, 18 November 2009.

¹¹¹ See Faure and Nollkaemper, above n 25, 171f.

¹¹² See International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN Doc A/56/10 (12 December 2001). Note that the Articles may not represent binding international law; however, they are considered an important guide concerning norms on state responsibility; see Tol and Veryheyen, above n 24, 1111.

force at the time when a dispute in regard to it arises or falls to be settled.’¹¹³ Responsibility for historic emissions may thus be challenged by international norms concerning state responsibility; legal obligations to curb climate change are very recent and apply only to some actors. Faure and Nollkaemper concur but argue that emitting greenhouse gases is a ‘composite act’ which becomes wrongful at a certain point in time only over time. Although identifying that exact point presents its own challenges, ‘the effect will be that past emissions will only be subjected to a responsibility regime at the date when they become [...] wrongful’,¹¹⁴ a point likely in the much more recent past.

The Perpetrator(s): Unjust Harm or Unjust Benefit?

A final way of dealing with the historical dimensions presented by climate change and the harms and losses emanating from it might be to recall that corrective justice is about re-establishing an equilibrium between losses or harm *and* related gains. It is perhaps not so difficult to establish losses and harm in the climate change context, including that arising in relation to displacement: although causal and moral attributions present multiple challenges, many of which have been explored in the preceding pages, that many of the effects of climate change upon its victims may ultimately be significant, harmful and unjust may not be so difficult to argue. However, what about unjust gains? A novel inter-generational argument proposed in particular by Henry Shue crystallises here: today’s inhabitants of developed countries undoubtedly enjoy privileged lifestyles. However, such lifestyles, Shue argues, are not ‘completely unrelated’ to the activities of their prior fellow countrymen, including those activities that led to the emission of greenhouse

¹¹³ *Island of Palmas (Netherlands v United States)* [1928] 2 RIAA 829, 845; in Faure and Nollkaemper, above n 25, 172.

¹¹⁴ Faure and Nollkaemper, above n 25, 171f.

gases.¹¹⁵ Neumayer makes a similar argument when stating that current high living standards in wealthy countries are the direct result of ‘having had the possibility of burning large amounts of fossil fuels’ in the past as well as now. He goes on to argue that therefore

[t]he fundamental counter-argument against not being held accountable for emissions undertaken by past generations is that the current developed countries readily accept the benefits from past emissions in the form of their high standard of living and should therefore not be exempted from being held accountable for the detrimental side-effects with which their living standards were achieved.¹¹⁶

In the climate change context, such a ‘beneficiary pays’¹¹⁷ approach thus stipulates that, as a matter of corrective justice (at least in its ‘pure’ form), perpetrators may be responsible for the detrimental effects of emissions not only because they are the agents of harm and losses but also as a matter of unjust benefits which simultaneously accumulated over several centuries in the case, certainly, of many developed countries.¹¹⁸

Nevertheless, establishing a specific perpetrator, or perpetrators, remains a difficult task. Yes, there are those who have emitted greenhouse gases. Yes, those emissions, certainly in the collective, have harmful consequences, including impacting upon human displacement. However, the challenge that potential loss bearers will face in any ‘pure’ corrective justice-based claim is to causally and morally connect the harm or losses they experience with the particular actions of a particular entity, whether individual or collective. Fault or wrongful action, in particular, are simply not so easily established given that only collective action leads to harm, but not any one particular act; given that only action over time leads to harm, and not the action of one particular actor at one particular point in time; and

¹¹⁵ Shue, above n 57, 536; also outlined in Caney, above n 46.

¹¹⁶ Neumayer, above n 81, 189.

¹¹⁷ Caney coins this, amongst others; see Caney, above n 46, 756. Caney also questions this approach.

¹¹⁸ Admittedly, this argument is quite reminiscent of distributive justice with its emphasis on balance between burdens and benefits; see ch 7 of this thesis for more.

given that the harmfulness of the action concerned has been known to be harmful only for a relatively short period of time, and not for the entire length of time the activity now known to be harmful has been engaged in. Envisioning a fault-centred, ‘pure’ corrective justice-based claim is therefore complicated (if not altogether doubtful) by a multitude of factors; in relation to displacement also the fact that it is rarely the result of a single or only a climatic cause. A final parameter to consider in relation to opportunities for a corrective justice-based claim (‘pure’ or not) in the climate change displacement context is whether the re-instatement of a prior state of affairs so vital to corrective justice is possible, especially through compensation. In other words, the method of correction needs to be considered in relation to its object.

5. Correctable Harm or Damage?

The chapter has so far considered how it may be possible to isolate casualties in the climate change displacement context (the bearers of harm); how to isolate a particular perpetrator, or several, (the agent of harm and therefore the entity/entities potentially liable for correction); and how the two entities may be connected causally. A final component to consider when contemplating any corrective justice claim (‘pure’ or not) is whether the harm concerned amounts to one that is correctible – to dissect, in other words, the method of rectification. Since correction is usually envisioned to occur through compensation in some shape or form, a related question for the purposes of the chapter may be whether compensation specifically *can* correct the losses experienced in relation to displacement, and thereby reinstate the prior state of affairs. Many factors will have to be considered in contemplating such questions: How would responsibility for losses and their correction be

allocated? What should or can be compensated? Is there relevant precedent of involuntary displacement having been corrected through compensation, particularly in the context of climatic or environmental change? Has it been successful? These questions will all be contemplated in the following sub-sections.

Attribution and Compensation

How, in the first instance, to conceptualise correction/compensation in the climate change displacement context may depend on important questions of attribution and allocation. The many difficulties concerning the attribution of certain events and their consequences (including displacement) to the actions of certain actors have already been explored. Undoubtedly, however, questions concerning attribution influence the award of compensation. Several possibilities are worth considering and suggested by Faure and Nollkaemper:¹¹⁹ Most simply, victims may wish to argue that a compensation claim could be based on establishing some ‘statistical chance’ that certain greenhouse gas emissions have contributed to a certain event with displacement consequences and that full compensation should emanate from any such probability (from emitters). Alleged perpetrators, on the other hand, will likely seek to argue that compensation is due only if greenhouse gas emissions can be linked to an event with displacement consequences in an absolute sense. Both of these positions may be unjust: the first asks that perpetrators bear responsibility even in instances where the probability that they have contributed to harm could be slim. The second would permit that perpetrators are excused from any responsibility even where their contribution to harm may not be negligible.¹²⁰ A compromise may be

¹¹⁹ Faure and Nollkaemper, above n 25, 162f. For more regarding allocation, see also Daniel A Farber, ‘Apportioning Climate Change Costs’ (2008) *UCLA Journal of Environmental Law and Policy* 21.

¹²⁰ Faure and Nollkaemper, above n 25, 163.

that compensation is awarded only when a certain probability threshold has been breached, realistically at least fifty percent, with no compensation due below that threshold and full compensation due above it. Faure and Nollkaemper have suggested a fourth approach. This has the advantage of permitting at least the possibility of successful (if partial) compensation, though it would not permit that a prior state of affairs is reinstated fully. Applying their model to displacement, allocation of damages would look something like this: if the probability that climate change triggered a particular flooding event with displacement consequences is thirty percent, entities affected by the flooding should be able to receive compensation amounting to thirty percent of the damages and losses they experienced.¹²¹ Realistically and effectively seeking compensation on this basis, or any of the probability or attributions scenarios just outlined, is hampered, however, by the multitude of actors that have contributed to emissions which may have contributed to climate change and thereby increased the risk of flooding (so even if the likelihood of an event with displacement consequences having been triggered by anthropogenic climate change is only thirty percent, no single entity is responsible for even that thirty percent share). The proportional share of separate actors' (e.g. country) emissions would therefore also have to be considered before awards of compensation could materialise.

Furthermore, in thinking about attribution and compensation duties in the climate change displacement context, it is important not only to consider what is attributable to likely perpetrators. Chapter Two noted that climate change does not influence human mobility in isolation of other pre-existing factors, for example local circumstance, politics and culture. Such factors, too, may impact on likely

¹²¹ Ibid, 164.

displacement in the climate change context. Contemplating compensation, therefore, must also take note of the possible contribution that affected individuals, communities or states may have themselves made to displacement, or at least the circumstances for which others cannot, realistically, be held responsible (including, in some cases, emissions that have not been insubstantial in countries also facing displacement). In domestic legal systems this is referred to as ‘contributory negligence’.¹²² In international law, the International Law Commission (ILC) recognised that contributions to harm by an injured state, whether wilful or negligent, would also have to be considered in determining reparations.¹²³ The ILC has argued that only this would implement a reparations regime ‘consistent with fairness’.¹²⁴

Precedent

Despite the difficulties of attributing duties of compensation, it is of course fundamentally possible to conceive of displacement as a compensable harm. Literature on development-related displacement and relocation has noted failures but also successes in compensatory processes that respond to displacement or relocation.¹²⁵ At least contemplating what may be compensable and how compensation should operate is therefore possible. In relation to climate change impacts, quantifying losses associated with the possibility of displacement in the climate change context has already been undertaken by a number of threatened

¹²² International Law Commission, ‘Commentary on Article 39’ in *Draft Articles on Responsibility of States for Internationally Wrongful Acts – With Commentaries*, UN Doc A/56/10 (12 December 2001) para 1.

¹²³ See International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ in *Report of the International Law Commission on the Work of its Fifty-Third Session*, UN Doc A/56/10 (12 December 2001); henceforth also ‘Articles on State Responsibility’.

¹²⁴ International Law Commission, above n 122, para 2.

¹²⁵ See, eg, the various entries in Cernea and Mathur, above n 18.

communities in Alaska. At least twelve indigenous communities there need to move elsewhere (internally) due to the effects of climate change (in particular, flooding and erosion resulting from melting permafrost and diminishing sea ice).¹²⁶ For some, the need to relocate is becoming urgent.¹²⁷ The United States Army Corps of Engineers and other government offices have compiled several reports which concern eventual relocation, including associated timeframes and costs. According to a 2006 report, the villages of Kivalina, Newtok and Shishmaref, for example, all had less than 15 years before they would become uninhabitable (by ca. 2020), with the costs of relocation estimated to range from USD 95 Million to USD 200 Million per village,¹²⁸ in the case of one village, Newtok, USD 380,000 per resident.¹²⁹ These figures were arrived at by anticipating ‘the cost of relocating the entire community to a new site, including all the existing facilities, structures and utilities that could be moved and replacement of those that could not.’¹³⁰ The Corps also, however, acknowledges that the cost/benefit approach taken in its report may not be ‘appropriate for relocation analysis’, as many non-material or non-monetary items not connected to infrastructure, perhaps best described as social capital, cannot be easily reflected in dollar terms.¹³¹ In any case, none of the communities has actually relocated (although some have initiated measures that would facilitate eventual

¹²⁶ See Robin Bronen, ‘Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine’ (2011) 35 *NYU Review of Law and Social Change* 357; Robin Bronen, ‘Climate-Induced Displacement of Alaska Native Communities’ (Brookings-LSE Project on Internal Displacement, 2013); also United States Government Accountability Office, *Alaska Native Villages: Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion* (2009) <<http://www.gao.gov/new.items/d09551.pdf>>.

¹²⁷ See United States Army Corps of Engineers – Alaska District, *Alaska Village Erosion Technical Assistance Program* (April 2006) <http://www.housemajority.org/coms/cli/AVETA_Report.pdf>.

¹²⁸ Ibid, Executive Summary.

¹²⁹ Anna York, *Alaskan Village Stands on Leading Edge of Climate Change* (2009) <<http://unc.news21.com/index.php/climate-refugees.html>>. There is evidence that these figures were overestimated; see a Brookings Institute sponsored panel discussion on arctic indigenous peoples’ displacement and climate change: *Adventures in Climate Change, Arctic Indigenous Peoples, Displacement, and Climate Change: Tracing the Connections* (2013) <<http://adventures-in-climate-change.com/capital-correspondent/>>.

¹³⁰ United States Army Corps of Engineers – Alaska District, above n 127, 7.

¹³¹ Ibid, 4.

relocation), though the inhabitants of some now reside in very poor conditions. Difficulty in receiving funding and other support for relocation has been the most significant challenge for those affected.¹³²

An important international example of compensation for both the material and some of the non-material losses experienced through displacement and relocation is provided in relation to compensation claims sought in connection with 20th century United States' nuclear testing in the South Pacific.¹³³ Between 1946 and 1958, the US conducted sixty-seven nuclear tests in the Marshall Islands, at the time a United Nations Trust Territory administered by the US, therefore obliged to 'protect the inhabitants against the loss of their lands and resources.'¹³⁴ Prior to conducting its tests, the United States nevertheless removed people from several of the area's atolls, keeping them in exile on more distant, isolated and resource-poor islands for decades, whilst scarcely providing for their basic needs and contaminating their home atolls.¹³⁵ As early as 1982, affected persons, by now returned to only partially restored atolls, filed compensation claims in US courts, all of which were dismissed on jurisdictional grounds when a Compact of Free Association¹³⁶ went into effect, which established a Nuclear Fund 'to address past, present and future consequences of the Nuclear Testing Program'¹³⁷ and implemented a Nuclear Claims Tribunal as

¹³² See Bronen, 'Climate-Induced Community Relocations', above n 126. Note that one of these villages, Kivalina, was involved in a damages suit founded in 'nuisance'; see *Native Village of Kivalina v Exxon Mobil Corporation*, No C 08-1138 SBA (ND Cal, 2009). The case was dismissed based on 'political question doctrine'.

¹³³ See, eg, Davor Pevec, 'The Marshall Islands Nuclear Claims Tribunal: The Claims of the Enewetak People' (2006) 35 *Denver Journal of International Law and Policy* 221.

¹³⁴ *Trusteeship Agreement for the Former Japanese Mandated Islands*, signed 6 July 1947, 8 UNTS 189, art 6.

¹³⁵ Pevec, above n 133, 228.

¹³⁶ *Compact of Free Association (United States and Marshall Islands)*, signed 25 June 1983, 99 Stat 1770 (entered into force 1986).

¹³⁷ See *Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association* (1983), Preamble <<http://www.nuclearclaimstribunal.com/177text.htm>>.

the only means to seek compensation.¹³⁸ Claims to the Tribunal have since included those for the ‘loss of use of land’ during exile and for ongoing costs of ‘restoration and rehabilitation’ of land following nuclear testing, but also for the ‘hardship and suffering’ involved both in being displaced and returning to only partially restored and inhabitable atolls.¹³⁹ In the case of the Enewetak people, for example, relocated to a tiny atoll for 33 years, the Tribunal awarded between USD 3,000 and USD 4,500 per year per person exiled – or a total of USD 34 Million – for hardship and suffering alone.¹⁴⁰ Although receiving funding in this – and all other categories – has been hampered by political haggling and the fact that the Nuclear Fund was set up with a finite budget, these cases, as well as the Alaskan example, nevertheless provide an important background by which to consider compensation for displacement in the climate change context and relocation.

The Alaskan example provides an important precedent because it relates directly to displacement (and the necessity to relocate) induced by what are thought to be climate change-related impacts and because attempts to quantify losses at both the individual and community level have already been made there. Such losses, or rather the costs involved in correcting them, are relatively large (even where only physical asset recovery is sought). Naturally, the figures arrived at are not directly transferable to other contexts, but there is no reason that quantification of at least many of the physical losses or damage in other contexts is not equally possible. The nuclear testing in the South Pacific example provides a useful precedent because displacement and relocation also occurred in relation to a degraded environment, because compensation considered both the material and non-material losses incurred in relation with such movement, because it considered compensation even where

¹³⁸ Pevec, above n 133, 229f.

¹³⁹ Ibid, 231ff.

¹⁴⁰ Ibid, 237.

eventual return was possible, and because it includes a cross-border dimension. In other words, compensation was enabled even for lengthy but temporary ‘loss of use’. Nevertheless, it is one thing to argue that compensation in some shape or form is possible for displacement in the climate change context. It is quite another to argue that displacement is a harm which is correctable – that compensation could truly rectify the consequences and reinstate the prior state of affairs.

Compensation or Correction?

The problem with a purely compensatory approach (that is monetary compensation) to correcting the consequences of displacement in the climate change context is that experience with development-related displacement and involuntary relocation has long shown that compensation is not straightforward or necessarily leads to positive outcomes. As can be recalled from Chapter Four, corrective justice supports the notion that any correction should restore the prior state of affairs. In theory, this is a noble goal. However, achieving this in practice through compensation and in the displacement context might provide challenges.¹⁴¹ Seth Lazar, for example, has outlined the limits of compensation as follows:

[T]he practical feasibility of this method of rectification [compensation] is undermined by its moral insensitivity when taken too far – the belief that all losses can be compensated might entail a gross conflation of categorically different values, such as money and human life; it might also imply that the payment of compensation renders the injury permissible.¹⁴²

The ‘justice’ of correction may therefore be in question if it is to be enacted through compensation. Essentially, with a compensatory approach to correcting the causes and consequences of displacement in the climate change context, no more than

¹⁴¹ See also Michael Cernea, ‘Compensation and Investment in Resettlement: Theory, Practice, Pitfalls, and Needed Policy Reform’ in Cernea and Mathur, above n 18, 11, 57.

¹⁴² Seth R M Lazar, ‘Corrective Justice and the Possibility of Rectification’ (2008) 11 *Ethic Theory and Moral Practice* 355, 356.

market value may be attached, and only to some (usually tangible) losses (the issue in the Alaskan example just provided). Usha Ramanathan and others have argued that this inevitably confuses displaced persons with ‘willing sellers’ and will not necessarily resolve the task of restoring incomes and livelihoods, a dynamic long familiar from development-related displacement, condemning many to impoverishment that bears no relation to the conditions of their prior lives.¹⁴³ How, after all, does one attach market value to broken communities, lost heritage, lost employment opportunities, and the many other human sufferings so often involved in the displacement or relocation experience?¹⁴⁴ Furthermore, how would compensation be implemented where affected populations are not, as is frequently the case, structured around ‘formal legal rights’, for example in relation to the ownership of property and other resources?¹⁴⁵

Given these difficulties, it may be unsurprising that there is strong evidence indicating that impoverishment and suffering persist long after, and in spite of, compensation for displacement or involuntary relocation in many cases.¹⁴⁶ Nowhere has this been more visible than in relation to involuntary relocation in connection with mega-dams. For example, the experience of over 21,000 families (resident in one hundred villages) dislocated by the Srisaillam project in Andhra Pradesh, India in the early 1980s has been well-documented:

The government has conceived and executed the Srisaillam project [...] without taking into consideration the human problem seriously [...]. The disbursement of compensation (in cash) did not encourage plans for resettlement. In the disbursement

¹⁴³ See Usha Ramanathan, ‘Displacement and the Law’ (1996) 31 *Economic and Political Weekly* 1486, 1491. Also, more generally, Michael M Cernea, ‘For a New Economics of Resettlement: A Sociological Critique of the Compensation Principle’ (2003) 55 *International Social Science Journal* 37, 38f and, more recently, eg, Sreya Maitra, ‘Development Induced Displacement: Issues of Compensation and Resettlement – Experiences from the Narmada Valley and Sardar Sarovar Project’ (2009) 10 *Japanese Journal of Political Science* 191.

¹⁴⁴ See eg, Ramanathan, above n 143, 6 and United States Army Corps of Engineers – Alaska District, above n 127, 7.

¹⁴⁵ Ramanathan notes many of these shortcomings of displacement; above n 143, 6.

¹⁴⁶ Cernea, above n 143, 40; also Cernea, above n 141, 41.

of compensation there appears to have been widespread corruption. Large and rich farmers managed to receive compensation, for both house sites and land lost, at reasonably competitive terms; people with low economic and social status did not get fair compensation for the property lost. The people were neither educated nor taken into confidence regarding the various issues involved in computing compensation, evacuation and rehabilitation.¹⁴⁷

Ultimately, then, a monetary compensation approach alone is not enough, especially if driven by little more than the replacement of (some) tangible assets. Rather, Susan Tamondong cites several measures that must accompany compensation, including consultation (participatory justice), income and livelihood restoration and other additional safety nets.¹⁴⁸ To prevent ‘under-compensation’,¹⁴⁹ this will likely also be vital in any compensatory approach to displacement connected to climate change.

6. Corrective Justice and International Law

The chapter has so far dissected various parameters essential to a ‘pure’, fault-centred corrective justice claim in the climate change displacement context: loss bearers (the recipients of injustice), perpetrators (the agents of injustice) and method (the means of correction). Where possible and relevant, connections to international law have already been drawn. However, if correction is to be operationalised through international law, a more full discussion of how fault-centred corrective justice features in international law in ways that may be relevant to climate change harms such as displacement is necessary. First and foremost, liability regimes that are directly relevant to correcting climate change harm, let alone to displacement in the

¹⁴⁷ Lokayan, quoted in Ravi Hemadri, Harsh Mander and Vijay Nagaraj, ‘Dams, Displacement, Policy and Law in India’ (World Commission on Dams, 1999) xii.

¹⁴⁸ Susan D Tamondong, ‘Can Improved Resettlement Reduce Poverty?’ in Cernea and Mathur, above n 19, 394.

¹⁴⁹ A term used by Cernea, eg, above n 143.

climate change context, currently do not exist under international law.¹⁵⁰ Although liability regimes permitting correction of environment-related harm do exist,¹⁵¹ their applicability to the climate change context is doubtful.¹⁵² The limitations of international human rights law have already been discussed.¹⁵³ It has therefore been suggested that norms regarding state responsibility for breaches of international obligations may be a better way to approach correction of climate change-related harms in the international arena.¹⁵⁴

What is important to understand here is that '[a]ll rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.'¹⁵⁵ More specifically, in the 1928 Permanent Court for International Justice (PCIJ) *Chorzow Factory* case, it was famously stated that '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'¹⁵⁶ and that 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed.'¹⁵⁷ The International Law Commission's 2001 Articles on

¹⁵⁰ Philippe Cullet, 'Liability and Redress for Human-Induced Global Warming: Towards and International Regime' (2007) 43A *Stanford Journal of International Law*, 99, 106.

¹⁵¹ Note again the aforementioned International Law Commission, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities*, in *Report of the International Law Commission on the Work of its Fifty-Eights Session*, UN Doc A/61/10 (1 October 2006).

¹⁵² Cullet, above n 150; see also R R Churchill, 'Facilitating (Transnational) Civil Liability Litigation for Environmental Damage by Means of Treaties: Progress, Problems, and Prospects' (2001) 12 *Yearbook of International Environmental Law* 3.

¹⁵³ See, eg, ch 3 of this thesis.

¹⁵⁴ See, eg, Tol and Verheyen, above n 24.

¹⁵⁵ Judge Huber, *Spanish Zone of Morocco* [1924] 2 RIAA 615, 641; translation provided in James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2008) 541.

¹⁵⁶ *Factory at Chorzow (Germany v Poland)* [1927] PCIJ (ser A) No 17, 29.

¹⁵⁷ *Factory at Chorzow (Germany v Poland)* [1927] PCIJ (ser A) No 17, 47.

State Responsibility (the result of over 40 years' work¹⁵⁸) also include the obligation to fully repair injuries arising from internationally wrongful acts,¹⁵⁹ stipulating further that reparation duties apply to any damage, both material *and* moral¹⁶⁰ (the latter refers to immaterial damage or loss, pain and suffering, for example; as was pointed out in the last section, this may be important in the climate change displacement context, where tangible damages or losses may not be the only ones experienced). Reparations may be in the form of restitution, compensation or satisfaction, or a combination of these.¹⁶¹ James Crawford notes, however, that '[p]ecuniary compensation is usually an appropriate and often the only remedy for injury caused by an unlawful act.'¹⁶² A breaching state is also under the obligation to cease the internationally wrongful act and to commit to non-repetition.¹⁶³

Seemingly, corrective justice is therefore a feature of international law. However, what is important to consider is perhaps not that international law accepts the importance of notions such as reparation and correction of harm¹⁶⁴ but that responsibilities for correction are engaged only in relation to the commission of an *internationally wrongful* act and not any act that is harmful or damaging. What is considered wrongful, faulty, or correctable, in other words, is the breach of an international obligation and not any activity leading to harm, damage or loss

¹⁵⁸ For a historic take on the topic in the ILC, see James R Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002).

¹⁵⁹ Art 31(1).

¹⁶⁰ Art 31(2). 'Moral damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life'; International Law Commission, 'Commentary on Article 31' in *Draft Articles on Responsibility of States for Internationally Wrongful Acts – With Commentaries*, para 5, 92; see also Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 805, who furthermore cites a number of cases where this has occurred.

¹⁶¹ Art 34.

¹⁶² Crawford, above n 155, 571.

¹⁶³ Art 30.

¹⁶⁴ In fact, this is firmly embodied in many international legal instruments and has been confirmed in the jurisprudence of many courts; see REDRESS, *What is Reparation?* (2004) <<http://www.redress.org/what-is-reparation/what-is-reparation>>.

elsewhere. Although strict state responsibility has been debated,¹⁶⁵ and the ILC has proposed the development of rules concerning harm arising out of potentially harmful but legal acts,¹⁶⁶ for the time-being any wrongful act engaging state responsibility and duties of reparation will likely be limited only to either a violation of a treaty obligation or a norm as enshrined under customary international law.¹⁶⁷ As Crawford notes, ‘there is no acceptance of a contract/derelict (tort) dichotomy’.¹⁶⁸ For displacement in the climate change context specifically, this does not bode well: although a right not to be displaced (and corresponding obligations) could be construed as an emerging right under international law, it is founded on little more than soft law instruments.¹⁶⁹ Perhaps more importantly, it is not conceptualised to apply extra-territorially.¹⁷⁰ Nevertheless, more generally state responsibility for the detrimental effects of climate change (possibly including displacement) may arise out of breaches of obligations enshrined elsewhere.

Treaties

It has been suggested that it may be possible to construe that state responsibility for climate change harms could be invoked in relation to breaches of the obligations

¹⁶⁵ See, eg, Tol and Verheyen, above n 24, 1113 and Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff, 2005) 169ff; also Phoebe N Okawa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford University Press, 2000)

¹⁶⁶ In relation to ultra-hazardous activities.

¹⁶⁷ Although the Articles on State Responsibility also make mention of ‘the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law’; see art 40. Nevertheless, Malcolm Shaw notes that only where ‘an unlawful act has taken place, which has caused injury and which has been committed by an agent of the state, that state will be responsible in international law’; see Shaw, above n 160, 783.

¹⁶⁸ Crawford, above n 155, 542. He similarly notes that ‘broad formulas on state responsibility are unhelpful and, when they suggest municipal analogies, even a source of confusion; Ibid, 555.

¹⁶⁹ See, eg, Michèle Morel, Maria Stavropoulou and Jean-François Durieux, ‘The History and Status of the Right not to be Displaced’ (2012) 41 *Forced Migration Review* 5

¹⁷⁰ Ibid, 7. However, Guy Goodwin-Gill and Jane McAdam note that ‘[a]n ambulatory principle nevertheless operates, obliging States to exercise care in their domestic affairs in the light of other States’ legal interests, and to cooperate in the solution of refugee problems; see Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 3.

contained in either the UNFCCC or Kyoto Protocol, for example.¹⁷¹ Fundamentally, the UNFCCC stipulates, in Article 2, that its main objective is ‘the stabilization of greenhouse gas concentrations’ and ‘the prevention of ‘dangerous anthropogenic interference with the climate system’. Article 3.3 asks that states act with precaution to ‘prevent or minimize the causes of climate change and mitigate its adverse effects’, even where full scientific certainty is lacking. Several more concrete obligations and their possible breaches have been highlighted. Faure and Nollkaemper, for example, have argued that where states are a party to the UNFCCC only (e.g. the United States), it may be possible to construe breaches under Article 4 of the UNFCCC:¹⁷² although that Article raises many largely ambiguous obligations – for example, to cooperate in climate change adaptation preparations¹⁷³ and to provide general assistance for developing country parties¹⁷⁴ – Annex I countries are further obliged to ‘take corresponding measures on the mitigation of climate change, by limiting [...] anthropogenic emissions of greenhouse gases and protecting and enhancing [...] greenhouse gas sinks and reservoir’.¹⁷⁵ Failure to do the latter may provide a basis state responsibility claim.¹⁷⁶ Where states have obligations under both the UNFCCC *and* the Kyoto Protocol, Faure and Nollkaemper argue that the more explicit responsibilities enshrined in the latter may give rise to a state responsibility claim.¹⁷⁷ Annex B of the Protocol, in particular, has bound certain countries to specified emissions reductions. Article 3(1) of the Protocol provides further impetus that Annex I parties should not exceed their assigned emissions

¹⁷¹ See, eg, Faure and Nollkaemper, above n 25, 142 and Verheyen, above n 165, 43ff.

¹⁷² Faure and Nollkaemper, above n 25, 143.

¹⁷³ United Nations Framework Convention on Climate Change, art 4(1)(e).

¹⁷⁴ Ibid, art 4(4).

¹⁷⁵ Ibid, art 4(2)(a). Faure and Nollkaemper, above n 25, 143.

¹⁷⁶ Faure and Nollkaemper, above n 25, 143.

¹⁷⁷ Ibid, 144. The first commitment period under the Protocol ended in 2012; however, a new commitment period has, in principle, been agreed, although it is not yet in force; see, eg, United Nations Framework Convention on Climate Change, *Doha Amendment* (2013) <http://unfccc.int/kyoto_proto/col/doha_amendment/items/7362.php>.

quantities. At least in theory, it is therefore possible to conceive that a failure to comply with obligations to both mitigate and assist with adaptation efforts breaches treaty obligations. However, the jurisdictional and causality issues already discussed present significant hurdles in finding an appropriate venue for, and causal basis of, such a claim, particularly in relation to displacement. Also, although the UNFCCC outlines many commitments and general obligations, it incorporates few specific duties that bind states concretely. It is, after all, a framework instrument. Roda Verheyen notes a lack of ‘obligations of results’, for example in relation to emissions reductions targets.¹⁷⁸ The future of the Kyoto Protocol, in the meantime, is somewhat uncertain.

Other treaty regimes have been investigated for their potential to provide the foundation for a state responsibility claim in the climate change context.¹⁷⁹ Of these, the Law of the Sea Convention (UNCLOS) may be particularly relevant. It provides that

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.¹⁸⁰

It continues by specifying that such measures ‘shall deal with all sources of pollution of the marine environment,’ specifically ‘the release of toxic, harmful or noxious

¹⁷⁸ Roda Verheyen, above n 165, 81f.

¹⁷⁹ See Andrew L Strauss, ‘The Legal Option: Suing the United States in International Forums for Global Warming Emissions’ (2003) 33 *Environmental Law Reporter* 10185, 10188f, who examines both the *United Nations Convention on the Law of the Sea* and the world trade regime. For more on the obligations arising under the world trade regime (specifically, the World Trade Organization – WTO), see also Meinhard Doelle, ‘Climate Change and the WTO: Opportunities to Motivate State Action on Climate Change through the World Trade Organization’ (2004) 13 *Review of European Community and International Environmental Law* 85.

¹⁸⁰ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 194(2); henceforth also ‘Convention’ as appropriate.

substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping.’¹⁸¹ Importantly, ‘pollution’ is defined as

the introduction by man, directly or indirectly, of substances or energy into the marine environment which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment or quality for use of sea water and reduction of amenities.¹⁸²

Such provisions may prove particularly useful when considering responsibilities in connection with threatened island nations and coastal states facing livelihood challenges with displacement consequences related to marine environments. Although high-emitting states like the United States are not signatory to the Convention, and there may be many practical hurdles requiring resolution before either a lawsuit (or at least advisory opinion) is to materialise, many of its provisions are generally considered a codification of customary international law and therefore may provide a basis for a legal challenge in principle.¹⁸³

Norms of Customary International Law

Customary international law may also contain further relevant norms as the basis for establishing state responsibility for climate change harms, even where an emitting state is not committed under a specific treaty. Customary international law is defined as ‘evidence of general practice accepted as law’.¹⁸⁴ Roda Verheyen and Peter Roderick argue that one such practice accepted as law is contained in the so-called ‘no harm rule’.¹⁸⁵ Based on the idea that states shall not cause injury or harm (environmental or otherwise) in other states, the rule has made states responsible for

¹⁸¹ Ibid, art 194(3)(a).

¹⁸² Ibid, art 1(1)(a).

¹⁸³ See Strauss, above n 179, 10188.

¹⁸⁴ Art 38, Statute of the International Court of Justice.

¹⁸⁵ Verheyen and Roderick, above n 40, 15. Roda Verheyen, in particular, has repeatedly argued convincingly that this provides a strong basis for a claim based on state responsibility; see, eg, Verheyen, above n 165; see also Christina Voigt, ‘State Responsibility for Climate Change Damages’ (2008) 77 *Nordic Journal of International Law* 1.

trans-boundary pollution at least since the *Trail Smelter Arbitration*.¹⁸⁶ It was reiterated by the ICJ in another important case, the *Corfu Channel* case,¹⁸⁷ and is further incorporated in the Preamble to the UNFCCC and both the 1972 Stockholm Declaration¹⁸⁸ and 1992 Rio Declaration,¹⁸⁹ the latter of which holds, for example, that

States have [...] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹⁹⁰

The ICJ also acknowledged its legal character in the 1996 *Nuclear Weapons Advisory Opinion*:

[T]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control *is now part of the corpus of international law* relating to the environment.¹⁹¹

Generally, the rule obliges states to prevent harms from occurring in the first place.¹⁹² Verheyen and Roderick further argue that it is ‘a pure duty of conduct, and no intent to cause harm is necessary’. Rather, prevention duties apply in any circumstance where ‘an activity can be reasonably shown to cause damage or risk’.¹⁹³ Nevertheless, the rule does not imply that states could be held responsible for any damage occurring as a result of their greenhouse gas emissions. Rather, a state’s activities must breach certain standards of care.¹⁹⁴

¹⁸⁶ *Trail Smelter Arbitration (United States v Canada)* [1941] III RIAA 1905.

¹⁸⁷ *Corfu Channel Case (United Kingdom v Albania)* [1949] ICJ Rep 244.

¹⁸⁸ *Declaration of the United Nations Conference on the Human Environment*, proclaimed 16 June 1972, UN Doc A/Conf.48/14/Rev 1(1973); henceforth also ‘Stockholm Declaration’.

¹⁸⁹ *Rio Declaration on Environment and Development*, proclaimed 3-14 June 1992, UN Doc A/Conf.151/26 (Vol I) (12 August 1992), henceforth also ‘Rio Declaration’.

¹⁹⁰ Principle 21. The Preamble to the UNFCCC reads essentially the same.

¹⁹¹ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] 35 ILM 809; italics by thesis author.

¹⁹² Verheyen and Roderick, above n 40, 15.

¹⁹³ *Ibid*, 16.

¹⁹⁴ *Ibid*.

All that said, however, significant challenges remain: First, there are questions as to whether the no harm rule is, in fact, a binding norm of international law, as it has been so rarely applied.¹⁹⁵ Secondly, there is some concern over the no harm rule's relevance in the climate change harm context because of the difficulties that any claimant would have to overcome the fact that climate change may not amount to trans-boundary harm, premised as that concept is, historically, on the notion that harm in one state must be traceable, specifically and unequivocally, to the specific and conclusive actions of an immediate neighbour. Roda Verheyen shows how responsibilities in relation to the no harm rule have become more broadly applied over time.¹⁹⁶ Nevertheless questions prevail as to whether climate change impacts can amount to *transboundary* pollution or harm and whether the causal issues already discussed would hinder reparative claims founded in the no harm rule.¹⁹⁷ Some cause for optimism may have been provided by an interesting case concerning the expansion and extension of the Czech Prunéřov II coal-based power plant, a significant source of CO₂ emissions.¹⁹⁸ Prior to approving the expansion and extension, in 2008, the Czech Ministry of Environment considered the ordering of a trans-boundary environmental impact assessment (TEIA) but struggled to initiate it, as well as failing to notify 'potentially affected states' of its intention, even though it

¹⁹⁵ Verheyen, above n 165, 153. Verheyen maintains that it is; *ibid*.

¹⁹⁶ See Verheyen, above n 165, 166f. For example, the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities* hold that "'transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border'; see International Law Commission, *Report of the International Law Commission*, UN Doc A/56/10 (12 December 2001) art 2(c).

¹⁹⁷ Verheyen, above n 165, 165f. Verheyen cites Meinhard Schröder as denying this, 'Klimaschutz als Problem des Internationalen Rechts' (1993) 21 *Jahrbuch des Umwelt- und Technikrechts* 191 ['Climate Protection as a Matter of International Law' (1993) 21 *Yearbook of Environmental and Technical Law* 191] argues this.

¹⁹⁸ See Greenpeace International, *Legal Steps Taken by the Federated States of Micronesia against the Prunéřov II Coal-fired Power Plant, Czech Republic: Background Information* (2010) <http://www.greenpeace.org/international/Global/international/planet-2/report/2010/3/teia_fsm.pdf>; also Maketo Robert et al, 'Transboundary Climate Challenge to Coal: One Small Step Against Dirty Energy, One Giant Leap for Climate Justice' in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing World* (Cambridge University Press, 2013) 589.

was obliged to do so under both domestic law and the Espoo Convention,¹⁹⁹ of which the Czech Republic is a signatory.²⁰⁰ In December 2009, the Federated States of Micronesia²⁰¹ nevertheless requested that a TEIA be conducted, arguing that the climate change impacts of the project deserved assessment.²⁰² Although an assessment eventually performed cleared the way for the expansion and extension of the plant, the Ministry of Environment also acknowledged that Micronesia *was* an ‘affected state’, and that its climate concerns would have to be addressed by several emissions reduction measure to be implemented by the plant.²⁰³ Importantly, the case makes it possible to conceive of climate change impacts as trans-regional and that responsibilities to counter the detrimental consequences of greenhouse gas emissions may arise even where states are not immediately adjoined.²⁰⁴

7. Conclusion

Aristotle outlined the importance of corrective justice to his overall justice paradigm millennia ago.²⁰⁵ It is vital to think about corrective justice also in relation to the ill effects arising from anthropogenic climate change, though there can be no doubt that climate change provides many particular conceptual, legal and other challenges that stand in the way of its effective or likely implementation. Nevertheless, harmful action has occurred and is occurring, whether this is attributable to individual or

¹⁹⁹ *Convention on Environmental Impact Assessment in a Transboundary Context*, adopted 25 February 1999, 1989 UNTS 309 (entered into force 10 September 1997); also ‘Espoo Convention’.

²⁰⁰ Greenpeace International, above n 198, 4f.

²⁰¹ Supported by Greenpeace International and the Environmental Law Service.

²⁰² Greenpeace International, above n 198, 5.

²⁰³ Greenpeace International, *Threatened Pacific Island Nation Makes Legal History by Challenging European Carbon Emitter* (23 May 2011) <<http://www.greenpeace.org/international/en/press/releases/Threatened-Pacific-Island-Nation-makes-legal-history-by-challenging-European-carbon-emitter/>>.

²⁰⁴ *Ibid.*

²⁰⁵ See ch 4 of this thesis.

collective, past or present entities. Although the causal, moral and especially legal responsibility for such action is complicated, not at least contemplating recompense would, in the words of Pablo de Greiff constitute ‘a form of injustice that consists [of] depriving [someone] of the sort of consideration which is owed to whoever is negatively or severely affected by the actions of others.’²⁰⁶ Relying on de Greiff, Maxine Burkett highlights how a reparative *process* (irrespective of outcome) in itself may also lead to solidarity amongst, and recognition for, those who partake in it, at least as important as more tangible outcomes otherwise desired.²⁰⁷

The present chapter has pondered, in particular, the possibility of addressing harm, damage and losses which emanate in connection with displacement in the climate change context. It has sought to do so through corrective justice which is fault-centred or ‘pure’; in other words, which prescribes that responsibility for correcting harm, damage or losses must be borne by a *particular* entity (or several) to whom fault can be ascribed. This fits well with both the Aristotelian construction of corrective justice and that of Weinrib, as outlined in Chapter Four. Weinrib, in particular, has conceived of corrective justice as ‘the disturbance of [...] equality [that] connects two, and only two, [parties].’²⁰⁸ The multiple causal, practical and legal issues which may stand in the way of such an approach in relation to displacement in the climate change context have been discussed in the chapter. Ultimately, this makes it seemingly easy to conclude that no correction, or compensation, is due or possible in that context, not if one wants to implement ‘pure’ corrective justice. Such a conclusion, of course, in its own way, also supports

²⁰⁶ Pablo de Greiff, ‘Justice and Reparations’ in de Greiff, above n 89, 460.

²⁰⁷ Maxine Burkett, ‘Climate Reparations’ (2009) 10 *Melbourne Journal of International Law* 509, 534.

²⁰⁸ Ernest J Weinrib, ‘Corrective Justice’ (1992) 77 *Iowa Law Review* 403, 410.

compensation, except that it should be no more than zero, hardly a just approach,²⁰⁹ even in the context of displacement in the climate change context, to which many factors and agents causally contribute. Surely, some redress is due, which would acknowledge the *external* influences that *do* contribute. Supporting this notion is Adrian Vermeule, who has advocated the idea of correction via his concept of reparations as ‘rough justice’: he has argued that even where obstacles (causal and many others) to justice and to compensation are seemingly significant, ‘a rough version of corrective justice suggests [wrongdoers] should pay something, more than zero’,²¹⁰ even where this cannot deal with all inevitable discrepancies involved in particular phenomena or interactions, or achieve all desired goals. Daniel Farber has argued similarly: ‘[n]o plausible system will precisely measure harm and match victims with historic GHG [greenhouse gas] emitters, but some form of rough justice seems achievable’.²¹¹

The next chapter will seek to argue that ‘rough’ corrective justice may be achieved most realistically or successfully for loss bearers in the climate change displacement context via conceptions of the construct which consider establishing fault and a specific perpetrator subsidiary to the notion that harm, damage or losses must be corrected, even in the absence of an isolatable agent (or several) that is directly or exclusively responsible for having caused them. Jules Coleman, in particular, has questioned why loss recovery must be ‘impose[d] on particular injurers’²¹² and cannot be operationalize via other mechanisms that do not focus so heavily on perpetrators. Ultimately, the chapter will show how, through removing

²⁰⁹ Adrian Vermeule, ‘Reparations as Rough Justice’ (Public Law and Legal Theory Working Paper No 105, Law School, The University of Chicago, 2005) 9.

²¹⁰ Ibid, 7; also Duncan French, ‘Global Justice and the (Ir)relevance of Indeterminacy’ (2009) 8 *Chinese Journal of International Law* 593.

²¹¹ Daniel A Farber, above n 39, 1608.

²¹² Jules Coleman, ‘Tort Law and the Demands of Corrective Justice’ (1992) 67 *Indiana Law Journal* 349, 352.

fault and the search for an exclusive perpetrator, not only is it possible to reconceptualise how corrective justice ought to function in relation to displacement in the climate change context but also how it is enacted.

CHAPTER 6

No-Fault, 'Rough' Corrective Justice: Insurance

Why be 'content to leave the compensation of casualties to the fortuitous outcome of litigation based on outdated and unrealistic notions of fault'?¹

(John Fleming, 1971)

1. Introduction

The previous chapter pondered the possibility of addressing harm and losses which emanate in connection with displacement in the climate change context through a compensation claim founded in 'pure' corrective justice, in other words, a corrective justice which is fault-centred, which prescribes that responsibility for correcting harm, damage or loss must be borne by the very entity (or several) which is specifically responsible for inducing it. The chapter outlined the multiple legal, conceptual, causal, practical and jurisdictional issues which may stand in the way of operationalizing such an approach under international law. The chapter nevertheless concluded that finding corrective justice-based solutions for loss bearers in the climate change context is important, as they would otherwise be left with the thoroughly unjust situation of having no means to seek redress. The current chapter will therefore proceed with the idea that achieving corrective justice for those affected by displacement in the climate change context must be made possible, even if through a more 'rough' version of corrective justice – and that it must be possible to affect it under international law. The chapter will continue working with the assumption that there are certainly identifiable victims in the climate change displacement context (thought they are not a homogenous group, or easily

¹ John G Fleming, *The Law of Torts* (The Law Book Company, 4th ed, 1971) 9.

delineated) and that the losses and harms they experience could be, if implemented thoughtfully, rectified in meaningful ways through compensation. Where this chapter will depart from the previous one is that it will no longer insist that there must be an isolatable, exclusive perpetrator to affect or operationalize corrective justice. Rather, it will proceed with the idea that a wrongful, certainly a harmful act (or a multitude), may indeed have occurred, even though it is difficult to identify who, specifically, is at fault for its occurrence, and even though it is difficult to argue that causal chains are simple or straightforward. Removing explicit fault for harm, and relenting on the search for a *specific, exclusive* perpetrator, the chapter will show, means some difficult hurdles related to causality and other matters become less of an impediment to a successful corrective justice-based compensatory claim (though by no means all causality (and many other) matters can be resolved through this approach). In particular, the chapter will argue that this could best be achieved through approaching correction and compensation through a mechanism akin to no-fault insurance.

Insurance, of course, is increasingly noted as an important device to respond to at least some of the detrimental consequences of climate change.² Initially, the relationship between insurance and climatic change was contemplated by large insurance companies and re-insurers who rightly began to be concerned about the potential commercial impact of increasing 'climatic variation' some decades ago already. Large German re-insurer Munich Re, for example, stipulated as early as 1973 that

[i]nvestigations into the overall trend of claims experience are indispensable, and here climatic variations become most significant. Such investigations involve a study of thermodynamic processes such as, for example, the rising temperature of the earth's

² See, eg, the various entries in a special issue of *Climate Policy* (vol 6, 2006) on insurance and climate change, some of which have been cited in this chapter.

atmosphere (as a result of which glaciers and the caps recede [...]) [...] We wish to enlarge on this complex of problems in greater detail, especially as [...] its conceivable impact on the long-range risk trend has hardly been examined to date.³

More recently, the potential role of insurance as an adaptive response mechanism to climate change impacts, particularly in poorer countries, has been highlighted and analysed. Koko Warner et al, for example, outline its possible role as an adaptive instrument in responding in particular to the aftermath of disasters.⁴ They argue that the adaptation benefits of insurance for climate change-affected persons and communities could include the continued availability of revenue in the immediate aftermath of a disaster, thereby preventing a down-ward spiral into poverty and increasing vulnerability, and the prevention of long-term negative after-effects of calamitous events.⁵ These are indeed important aspects of insurance in the climate change context and they will be explored more in later sections. However, equally important is to stress insurance's corrective justice potential,⁶ whereby insurance is conceptualised not only as an *adaptation* response to the negative consequences of climate change but also as *compensation* for climate change losses, damage and harm. This is hardly a novel conceptualisation of insurance: it has long played a role as a compensatory mechanism. What makes it different is that it does not usually rely on fault, on the establishment of a particular or exclusive duty bearer who unequivocally is causally connected to a loss bearer through the commission of a harmful act, in order to affect compensation. It is therefore a 'rougher' version of

³ Munich Re, 'Flood/Inundation' (August 1973); quoted in Walter R Stahel, 'In Favour of a Proactive Insurance Approach to Climate Change' (2009) 34 *The Geneva Papers* 319, 321.

⁴ Koko Warner et al, 'Adaptation to Climate Change: Linking Disaster Risk Reduction and Insurance' (Paper Submitted to the United Nations Framework Convention for the 6th Session of the Ad-Hoc Working Group on Long-Term Cooperative Action Under the Convention (AWG-LCA) from 1 until 12 June 2009, 6 June 2009) 4.

⁵ Ibid, 10.

⁶ See Peter Penz, 'International Ethical Responsibilities to "Climate Refugees"' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Hart Publishing, 2010) 151, 164, 167.

corrective justice, which enables compensation even in the face of intricate causal challenges, which makes it particularly relevant in the context of climate change, and more especially displacement, and the many difficult causal hurdles it entails.

This chapter, therefore, will address the following: the rationale behind, and rise of, no-fault compensation schemes, in particular insurance, as alternative corrective mechanisms, highlighting especially how this is important to the climate change context; the various ways in which the concept of insurance has arisen in relation to international law and to climate change, including the corrective justice components of such concepts; the potential of micro insurance; opportunities for insurance-based compensation to address in particular the needs and priorities arising in relation to displacement in the climate change context; and, finally, how best to operationalize compensation internationally through insurance.

2. Corrective Justice: From Fault-Centred to No-Fault Compensation

Vincent Covello and Jeryl Mumpower have traced the long history of insurance and argue that it 'is one of the oldest strategies for coping with risks'.⁷ They trace its origins to Babylonian times, 5000 years ago and note how the 4000 year old Code of Hammurabi contained explicit insurance-like provisions.⁸ Following the end of the Roman Empire, insurance waned, at least in Europe, but experienced a revival through the activities of the Hanseatic League and the Lombards from the 12th century.⁹ Many different types of insurance soon emerged: life insurance, marine

⁷ See, eg, Vincent T Covello and Jeryl Mumpower, 'Risk Analysis and Risk Management: An Historical Perspective' (1985) 5 *Risk Analysis* 103, 108.

⁸ Ibid.

⁹ Ibid.

insurance and even disaster-related insurance in the form of fire insurance, following London's Great Fire of 1666.¹⁰ The fact that insurance has a long history, including as a disaster response mechanism, is hardly controversial. However, this chapter explores its potential as no-fault compensation and 'rough' corrective justice. To understand how, historically, insurance came to play *this* role, it is important to understand, in particular, the emergence of no-fault workers' compensation in 19th century Europe.¹¹

Some form of workers' compensation had existed already in antiquity. The afore-mentioned Code of Hammurabi, for example, provided remedies for certain work-related injuries.¹² During medieval feudalism, serfs could, at least in theory, expect that their injury engaged certain responsibilities of their masters under the 'doctrine of noblesse oblige' ('nobility obliges').¹³ As tort law developed, liability-based claims against employers became a more distinct possibility for injured workers.¹⁴ However, this was long subject to several significant restrictions, outlined by Gregory Guyton:¹⁵ First, the doctrine of 'contributory negligence' stipulated that even where employers themselves had provided unsafe conditions, they were not liable if an injured worker had contributed (even insignificantly) to his own injury. Secondly, the 'fellow servant rule' stipulated that employers would not be liable where a co-worker had contributed (significantly or not) to a worker's injury. Finally, and perhaps worst of all, the 'doctrine of assumption of risk' meant that

¹⁰ Ibid.

¹¹ See also Penz, above n 6, 167 and David Schmitz and Robert E Goodin, *Social Welfare and Individual Responsibility* (Cambridge University Press, 1998) esp 156f.

¹² Gregory Guyton outlines the history of worker's compensation in greater detail; see Gregory Guyton, 'A Brief History of Worker's Compensation' (1999) 19 *Iowa Orthopedic Journal* 106. Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Butterworths, 7th ed, 2006) is also useful for a historical and legal take.

¹³ Guyton, above n 12, 107.

¹⁴ Schmitz and Goodin, above n 11. 156.

¹⁵ Guyton, above n 12, 108.

simply by contractually committing themselves to a certain work environment, employees acknowledged and accepted any risks potentially involved in the job, thereby relieving employers of liability when injury occurred. Many contracts, in fact, included clauses by which workers pro-actively absolved their employers from work injury-related liability.¹⁶ Even where no such clauses were signed, and even where a liability claim did materialise, the above restrictions, as well as the expense and length of claims, often led to failure for the applicant and therefore to significant suffering for workers.¹⁷ Only well-off workers were able to cover themselves for prospective injury, for example via the English 'Friendly Societies' or the German 'Krankenkassen'.¹⁸

In the context of social movements, in particular in Germany in the late 19th century, the plight of injured workers increasingly led to political demands that the workers' compensation system be altered.¹⁹ The system was rightly seen as unjust, favouring heavily employers over employees. In particular, the insistence that fault must be the key to compensation was soon isolated as a factor which condemned most injured worker to a system that could not provide them with a remedy.²⁰ By the late 19th century, workplace injury reparation was therefore removed from the realm of tort law and operationalized through no-fault insurance instead.²¹ This had several advantages: all workers were suddenly covered by basic insurance; premiums were usually covered by employees; the benefit to both parties was that lengthy and costly litigation could be avoided; most importantly, because establishing fault (and therefore duty bearers) was no longer the focal point of a claim, workers gained

¹⁶ Ibid.

¹⁷ Schmidt and Goodin, above n 11, 156 and Guyton, above n 12, 108.

¹⁸ Guyton, above n 12, 108.

¹⁹ Ibid, 109.

²⁰ Schmidt and Goodin, above n 11, 156f.

²¹ Ibid and Penz, above n 6, 167.

more predictable and certain access to compensation for work place injury.²² The advantages and benefits inherent to no-fault compensation in the work injury context were soon recognised in other contexts and it has come to be applied, for example, in relation to no-fault personal injury compensation²³ and no-fault car accident compensation, to name a few.²⁴ In some places, compensation claims are now more frequently addressed through no-fault corrective schemes than claims in the courts.²⁵

Why is any of this relevant in the context of climate change harm, loss or damage? First, no-fault insurance, as the name implies, is a compensatory mechanism that does not put fault (and therefore particularised responsibility) at the centre of compensation claims. This means that complicated causal chains usually involved in liability claims are no impediment to awarding compensation.²⁶ In other words, at least some of the complicated causality issues highlighted in the previous chapter would not necessarily stand in the way of compensation if a no-fault compensatory mechanism was available.²⁷ Secondly, fault-centred compensatory claims are slow, uncertain, costly and often unsuccessful,²⁸ even where causal issues are less complex than they are in the climate change and climate change and displacement context. This alone will make fault-centred correction an unlikely avenue to be pursued by the victims of climate change.²⁹ In relation to tort-like approaches to compensation, Peter Cane has asked

²² Ibid.

²³ Note, in particular, New Zealand's well developed scheme. See Accident Compensation Corporation (ACC), *About ACC* <<http://www.acc.co.nz/about-acc/index.htm>>.

²⁴ Schmidt and Goodin, above n 11, 157; the authors also cite no-fault divorce as an example.

²⁵ See Talina Drabsch, 'No-Fault Compensation' (Briefing Paper No 6/05, NSW Parliamentary Library Research Service, 2005) 46. The author notes this in relation to Canada, for example.

²⁶ Schmidt and Goodin, above n 11, 156ff and Penz, above n 6, 167, 169.

²⁷ See, eg, Penz, above n 6, 168f.

²⁸ Drabsch, above n 25, 50f

²⁹ Also Penz, above n 6, 169.

whether the huge cost of delivering tort compensation is worth the 'benefits' that would be lost in the move to a no-fault system [...]'³⁰

No-fault compensation in the climate change context would mean that legal fees become largely redundant, unless a dispute over a compensation award arises, that intricate causal chains may not have to be dissected and that claimants can receive compensation relatively quickly. In other words, it would foster a more efficient compensation system.³¹ And, finally, it would foster a fair system.³² Fault-based systems are often noted for not being fair: 'The fault system fails to accept the philosophy that is said to support it. It does nothing at all for the innocent victims of no-fault accidents'.³³ Patrick Atiyah, on the other hand notes that '[j]ustice may require payment of compensation without fault'.³⁴ Without recourse to compensation via no-fault schemes, loss bearers in the climate change context would likely face a grave injustice.

Final Words

No-fault compensation, enacted particularly through insurance, has become a much-utilised tool to ensure compensation in the face of causal uncertainty in many domestic settings. Rather than focusing on the dissection of causal chains and insisting on the establishment of fault that can be exclusively attributed to a particular duty bearer, no-fault compensation schemes accept that this is often futile but stress that this cannot mean that no recompense is due. They thus emphasise compensation, and the re-establishment of a state of affairs before harm, a loss or an

³⁰ Peter Cane, 'Reforming Tort Law I Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 654, 675.

³¹ Drabsch, above n 25, 50f.

³² Ibid, 49f.

³³ National Committee of Enquiry, *Compensation and Rehabilitation in Australia* (1974) 103.

³⁴ P S Atiyah, *Accidents, Compensation and the Law* (Cambridge University Press, 2nd ed, 1980) 475.

injury have occurred, over fault and fault-bearers. Operationalizing such schemes is often done through no-fault insurance. Relatively small premiums are paid, in the case of workers' compensation often by those who would otherwise be a defendant in a liability claim, through which more certain compensation is guaranteed. All of this is highly relevant when thinking about the uncertain prospects of gaining compensation through a fault-centred claim in relation to climate change harm or losses, including those which arise in connection with displacement. Insurance would provide a significantly more reliable, fair and efficient mechanism by which compensation could be sought. However, it is one thing to say that no-fault insurance, or a scheme akin to it, would be efficient, fair and perhaps even 'roughly' rooted in corrective justice – certainly if those who contribute to greenhouse gas emissions above certain thresholds were collectively made to fund the scheme (not as a matter of 'pure' corrective justice making them directly liable but as a matter of 'rough' corrective justice which acknowledges as least some contribution to harm). It is quite another to argue that international law supports the establishment of insurance, in particular as a corrective mechanism. The following sections will try to locate opportunities for insurance in the climate change context, both under international human rights law and under the international climate change regime.

3. Insurance in International Law: Human Rights

One area where the possibility of insurance arises in connection with international law is in the international human rights context, particularly concerning the right to social protection and the related right to social security, which is affirmed in several international human rights instruments. Both concern positive measures that states

should progressively implement, independently and collectively, to ensure, in particular, the equitable enjoyment of socio-economic and cultural rights. Such measures could include insurance, social or otherwise.

The importance of social security as a right is recognised in several international human rights instruments. The 1948 *Universal Declaration of Human Rights*, for example, states:

Everyone, as a member of society, has the right to social security and is entitled to the realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.³⁵

It adds that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.³⁶

Article 9 of the 1966 *International Covenant on Economic, Social and Cultural Rights* similarly 'recognise[s] the right of everyone to social security, *including social insurance*'.³⁷ In the regional context, the African Union endorsed the 2006 Livingstone Call for Action,³⁸ through which officials from 13 African states had acknowledged that social protection is a human right and that its implementation reduces poverty and inequality.

Historically, the goal for social security to be an internationally protected right emerged in the early part of the 20th century amongst efforts by the International

³⁵ Art 22.

³⁶ Art 25.1.

³⁷ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [italics added by thesis author]; henceforth also 'ICESCR' or 'Convention' as appropriate, see also art 5(e)(iv) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, art 26 of the *Convention on the Rights of the Child* and art 11 of the *Convention on the Elimination of All Forms of Discrimination against Women*.

³⁸ See African Union, *The Livingstone Call for Action* (2006) <http://www.ipc-undp.org/doc_africa_brazil/Livingstone-call-for-action.pdf>.

Labour Organisation to protect workers' rights.³⁹ To extend such rights, by the end of the Second World War, the ILO declared that it would increase its efforts to further 'the extension of social security measures to provide a basic income to *all* in need of such protection',⁴⁰ presumably not just workers. Nevertheless, as Cichon et al outline, the concept remained largely tied to protecting the rights of workers making their livelihood in the formal economy.⁴¹ Even recently, in its World Social Security Report 2010/11,⁴² the ILO prioritised that measures to implement social security are first of all about protection from income volatility and unemployment.⁴³

This explains in part why the concept is of limited relevance: if social security, including social insurance, is linked to participation in the formal economy, then many individuals remain unprotected, especially in places where unemployment or participation in informal economic activity is high.⁴⁴ In large parts of Africa, Asia and Latin America, in particular, most of those who work do so in the informal economy, for example.⁴⁵ Thus it is not surprising that only one in five working people enjoy access to social security schemes globally, although as little one in twenty do so in poorer countries.⁴⁶ Furthermore, it has been noted how in many countries, including those where inhabitants have for several generations enjoyed

³⁹ See Michael Cichon, Christina Behrendt and Veronika Wodsak, 'The UN Social Protection Floor Initiative: Moving Forward with the Extension of Social Security' (2011) 2 *International Politics and Society* 32, 33.

⁴⁰ International Labour Organization, *Declaration Concerning Aims and Purposes of the International Labour Organization* (Declaration of Philadelphia) (1944) s III(f) <<http://www.ilo.org/ilolex/english/iloconst.htm>> [italics by thesis author].

⁴¹ Cichon et al, above n 39, 33.

⁴² International Labour Organization, 'World Social Security Report 2010/11: Providing Coverage in Times of Crisis and Beyond' (International Labour Office, 2010).

⁴³ Ibid, 13; though it also notes health care and general poverty and social exclusion.

⁴⁴ Cichon et al, above n 39, 36, 37f.

⁴⁵ International Labour Organization, above n 42, 28.

⁴⁶ See Ibid, 29f; ch 2 of the report cites many more important figures.

formidable access to social security, spending on social security measures is now being reduced, a result of processes including globalisation and financial crisis.⁴⁷

Given the historically limited scope of the social security concept, 'social protection' has gained some traction as a broader concept which incorporates protection from scarcity or impairment in more wide-ranging contexts.⁴⁸ For example, the United Nations Research Institute for Social Development has outlined the scope of the social protection concept as follows:

[it] is concerned with preventing, managing, and overcoming situations that adversely affect people's well-being. It helps individuals maintain their living standard when confronted by contingencies such as illness, maternity, disability or old age; market crisis such as unemployment; as well as economic crises or [importantly for this chapter] natural disasters.⁴⁹

It includes social insurance and social assistance amongst the methods by which this is to be achieved, with the latter in particular referring to 'transfers to those who are unable to work or [are] excluded from gainful employment and who are deemed eligible, whether on the basis of their income, their vulnerability status or their rights as citizens.'⁵⁰ According to the World Bank, social protection 'focuses specifically on the poor, since they are the most vulnerable to risk'.⁵¹ The World Commission on the Social Dimension of Globalization has emphasised that 'a minimum level of social protection' must underpin the operation of the global economic order.⁵²

⁴⁷ See, eg, Vito Tanzi, 'Globalization and the Future of Social Protection' (2003) 49 *Scottish Journal of Political Economy* 116; also International Labour Organization, above n 42, 28; also Cichon et al, above n 39, 34.

⁴⁸ Cichon et al, above n 39 and International Labour Organization, above n 42, 13.

⁴⁹ United Nations Research Institute for Social Development, 'Combating Poverty and Inequality: Structural Change, Social Policy and Politics' (2010) 135.

⁵⁰ Ibid.

⁵¹ The World Bank, 'The Contribution of Social Protection to the Millennium Development Goals' (2003) 3.

⁵² See World Commission on the Social Dimension of Globalization, 'A Fair Globalization: Creating Opportunities for All' (International Labour Office, 2004).

Finally, social protection has also been considered a key mechanism by which to implement the Millennium Development Goals (MDGs).⁵³

Christian Jacquier et al emphasise the obligations raised in relation to social protection: They require all states ‘to take appropriate legislative, administrative, budgetary, judicial or other measures’ to guarantee such protection.⁵⁴ States’ obligations in this regard may be measured through their conduct – have they put certain measures in place (for example, insurance), or through outcomes – have certain aims been reached.⁵⁵ The authors also emphasise that realising social protection may have to include ‘equity subsidies from the rich to the poor’ and assistance from the international community.⁵⁶ Certainly, the Universal declaration leaves little doubt that international cooperation is vital to its implementation.

There can be no doubt that anthropogenic climate change will increase the need for the implementation of many social protection and security measures, including insurance, as it increases the risk of many harmful events with consequences for individual and community resilience and vulnerability occurring (impacting further also upon displacement, as Chapter Two outlined).⁵⁷ As was noted in Chapter Two, the Intergovernmental Panel on Climate Change (IPCC) has suggested that an overall increase in global average temperatures now underway, the result of human-induced greenhouse gas emissions, will lead to changes in precipitation amount, intensity and frequency, to more droughts, floods, heatwaves and storms and to

⁵³ The World Bank, above n 51, 3 and Cichon et al, above n 39, 42f.

⁵⁴ See Christian Jacquier, Gabrielle Ramm, Philippe Maradent and Valerie Schmitt-Diabate, ‘The Social Protection Perspective on Microinsurance’ in Craig Churchill (ed), *Protecting the Poor: A Microinsurance Compendium* (Munich Re Foundation, 2006) 45, 49.

⁵⁵ Ibid, 50.

⁵⁶ Ibid.

⁵⁷ Warner et al, above n 4, 6.

rising seas.⁵⁸ The IPCC has also noted that such events may impact poorer nations and their inhabitants more significantly than those better off.⁵⁹ A stark example of this is that 90 percent of human fatalities resulting from natural disasters occur in developing countries.⁶⁰ In the face of such stressors, social protection and security measures have been implemented in poorly-resourced states, including insurance.⁶¹ However, external support may be vital to ensure that such measures can be implemented more broadly and reach more people.⁶²

Nevertheless, although a strong case can be made that vulnerable populations must be supported through social protection and security measures, including insurance, in the climate change (including displacement) context, and many international human rights instruments also seemingly raise this possibility, such instruments provide few opportunities to argue that this can be demanded of an actor other than an affected person's own state. The International Labour Organization has stated that 'resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of the right to social security.'⁶³ However, the resources of many states *will* increasingly be stretched by the impacts of climate change. Viewed as a matter of corrective justice, this is unjust. At a time where social security or protection needs will rise, the ability of many states to provide

⁵⁸ See Intergovernmental Panel on Climate Change, *Frequently Asked Questions: From the Report Accepted by Working Group I of the Intergovernmental Panel on Climate Change* (2007) and ch 2 of this thesis.

⁵⁹ Intergovernmental Panel on Climate Change, 'Synthesis Report' in *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) s 5.2.

⁶⁰ International Development Association, 'Managing Natural Hazards, Reducing Risks to Development' (The World Bank, July 2009) 2.

⁶¹ Warner et al, above n 4, 7ff. A variety of schemes are introduced in James Midgley and Mitsuhiro Hosaka (eds), *Grassroots Social Security in Asia: Mutual Aid, Microinsurance and Social Welfare* (Routledge, 2011).

⁶² Warner, above n 4, esp 19.

⁶³ International Labour Organization, 'Extending Social Security to All: A Guide through Challenges and Options' (International Labour Office, 2010) 13.

either will be detrimentally impacted. As a matter of corrective justice this situation should be remedied through the provision of social protection, including through insurance, by those who have detrimentally impacted states' own ability to provide it. Unfortunately, international human rights law provides very little opportunity to build this case. Although international cooperation is mentioned in the social security context in the Universal Declaration, it does not create binding legal obligations. Achieving corrective justice through insurance in the international human right context is therefore highly unlikely. The following chapter will explore other avenues.

4. Insurance in the Climate Change Negotiations Context

Where the topic of insurance against the detrimental consequences of climate change has arisen more expressly is in the context of the international climate change negotiations. In fact, it is firmly enshrined in many provisions of the international climate change regime. Article 4.8 of the UNFCCC, for example, stipulates that based on their common but differentiated responsibilities, developed country parties consider taking actions that meet the needs of their developing country counter-parts in the climate change context, which could include the provision of insurance. Article 3.14 of the Kyoto Protocol similarly requires that Annex I states parties strive to minimise the adverse impacts of climate change upon poorer states through the establishment, amongst other measures, of insurance. The Bali Action Plan, which in 2007 committed UNFCCC states parties to '*enhanced* action on adaptation', encouraged consideration of '[r]isk management and risk reduction strategies,

including risk sharing and transfer mechanisms such as insurance⁶⁴ as an adaptive strategy.

Based on such foundations, several concrete proposals have emerged. Generally speaking, these can be divided into two categories. Some, in line with the Bali Action Plan vision, conceptualise insurance as a risk sharing and response tool and therefore as an adaptive response mechanism. Fewer conceptualise insurance also as no-fault compensation. Discussion of several prominent proposals will illustrate the difference.

Insurance as a Risk Management or Response and Adaptation Measure

A 2006 proposal envisioned the establishment of an international Climate Change Funding Mechanism (CCFM) to provide state-level financial support in particular for public infrastructure losses resulting from the effects of climate change through a system akin to insurance.⁶⁵ Participation was to be prioritised for ‘less developed countries’ and a key condition of the scheme was that participation was to be dependent upon the implementation of risk reduction measures. Several important features crystallised:⁶⁶ a) only ‘public sector assets’ would be covered; b) only damage resulting from ‘extreme catastrophic events’ would be covered; c) to counter moral hazard (risk taking behaviour), ‘minimum risk reduction measures’ would have to be implemented by each participating state to be eligible for the scheme; d) participating states would be responsible for covering premium payments into the

⁶⁴ See United Nations Framework Convention on Climate Change, *Revised Draft Decision -/CP.13: Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention: Proposal by the President*, UN Doc FCCC/CP/2007/L.7/Rev.1 (14 December 2007) para 1(c)(ii); henceforth also ‘Bali Action Plan’.

⁶⁵ See Christoph Bals, Koko Warner and Sonja Butzengeiger, ‘Insuring the Uninsurable: Design Options for a Climate Change Funding Mechanism’ (2006) 6 *Climate Policy* 637.

⁶⁶ *Ibid*, 641ff.

scheme; e) however, the proposal acknowledges that many potential participants would have a 'low' or 'non-existent' ability to participate on that basis; f) the scheme therefore ideally envisioned developed country participation and subsidisation; finally, g) participating states could reduce their contributions through implementing risk reduction measure, which would be considered in-kind payments.

The proposal has several innovative features, especially in that it combines risk reduction with insurance participation. However, since the purpose of this chapter is to investigate the role of insurance as corrective justice, the proposal is found to be lacking from that perspective.⁶⁷ Although it encourages international support to help poorer countries cover premiums, it does not raise the possibility that high emitting nations (often richer nations) may have the responsibility to cover premiums/pay outs because of their contribution to the occurrence, in the first place, of losses and damage to be covered by the scheme. The scheme does instead raise the possibility that the premium burden on poorer countries could be reduced. However, the basis for this would be the implementation of risk reduction measures by policy holding states themselves, affordability of which may be an issue in and of itself for many poorer nations.⁶⁸ Joanne Linneroth-Bayer and Reinhard Mechler note one final issue with the stipulated risk and premium reduction measures, one which might have consequences in relation to displacement: who is to say that people may not, for example, be forced to leave an area targeted for measures that are eligible under the scheme's risk and premium reduction measures?⁶⁹ In other words, without

⁶⁷ The authors do acknowledge that they wish to explore in particular the role insurance could play in adaptation; *ibid*, 637.

⁶⁸ Joanne Linneroth-Bayer and Reinhard Mechler, 'Insurance for Assisting Adaptation to Climate Change in Developing Countries: A Proposed Strategy' (2006) 6 *Climate Policy* 621, 625.

⁶⁹ *Ibid*.

appropriate oversights, states' efforts to engage in CCFM premium reduction eligible measures may well have harmful consequences for some.

Linneroth-Bayer and Mechler themselves have prominently advocated for a two-tier system which would provide both insurance *and* a mechanism for uninsurable climatic disasters.⁷⁰ Regarding the first tier, the authors envision that it could be operationalized through a single entity or institution or through agreements between various stakeholders in public-private partnerships at the local, national or global levels.⁷¹ Contributions to the scheme could be financial but also in the form of technical expertise.⁷² They emphasise that insurance instruments must be affordable, especially for 'vulnerable and marginalised communities', which could be achieved through various levels of donor support, for example, premium subsidies and risk spreading via reinsurance.⁷³ The proposal also emphasises that prevention of moral hazard (risk taking behaviour) must be an integral component to the scheme (both tiers).⁷⁴

A second tier⁷⁵ would be set up exclusively for losses emanating from uninsured or uninsurable disasters. The authors envision that the financial inputs for this tier would originate from developed countries. Because the second tier is about responding to losses in the context of disasters, the proposal argues that 'pre-negotiated terms' should foster a rapid response where a disaster has occurred.

Innovative features of this proposal include that it accounts for the possibility that there are some potential losses in the climate change context that may not be insurable but which can nevertheless not be ignored. However, from a corrective

⁷⁰ Ibid, 625ff.

⁷¹ Ibid, 626.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid, 631f.

justice perspective, this proposal is once again lacking: it suggests an insurance scheme that does not address insurance's potential as no-fault compensation. Rather, it suggests a scheme that operates much like aid does today. It encourages the international community, especially wealthier countries, to consider their role in implementing a system that is altogether more affordable and efficient. However, it does not ultimately make those who contribute to climate change harms through emissions responsible, in some way, for loss recovery through insurance.

An Example

The kind of international insurance schemes outlined in climate change insurance proposals, including the ones just reviewed, are founded in more than theory. Already, inter-country insurance schemes that cover at least severe natural disasters exist, funded and operated, to a large degree, with the assistance of international aid and financial institutions. The World Bank, for example, has been a driving force behind the Caribbean Catastrophe Risk Insurance Facility (CCRIF), established in 2007. The area is subject to frequent and severe natural disasters. Fifteen significant storms occurred in the area in 2004, for example, including Hurricane Ivan, which caused significant damage in many regional countries (USD 800 million in Grenada alone).⁷⁶ Dealing with such impacts is difficult for each individual island nation and there had been little access to disaster insurance until the involvement of the World Bank.⁷⁷ The scheme developed by the Bank is based on the idea of inter-country risk pooling, which keeps premiums relatively low. Both country members and donor

⁷⁶ Global Facility for Disaster Reduction and Recovery, 'Caribbean Catastrophe Risk Insurance Facility (CCRIF): Pooling Risk to Protect Against Natural Disasters' (2011) 1.

⁷⁷ Ibid and Francis Ghesquiere et al, 'Caribbean Catastrophe Risk Insurance Facility: A Solution to the Short-Term Liquidity Needs of Small Island States in the Aftermath of Natural Disasters' (The World Bank, 2003) 1.

contributions have funded it and it is partially linked to financial and insurance markets, for example through re-insurance.⁷⁸ Each country contributes in accordance with a risk profile that has been established for it and compensation pay outs are triggered when certain pre-determined thresholds (e.g. intensity of a storm) are reached.⁷⁹ The scheme has largely been hailed a success: several pay outs totalling millions of dollars have been made since the scheme was established in 2007,⁸⁰ though it is important to note that it covers only the initial post-disaster needs that states have and not all losses.⁸¹

Insurance as Compensation: AOSIS Proposals

It was the Alliance of Small Island States (AOSIS), many of whose members anticipate to be impacted also by displacement in the climate change context, which suggested an international insurance scheme (or 'pool') in the early 1990s, that was founded in the notion of insurance as compensation. In particular, it made wealthier, high-emitting countries (as a whole) responsible for mandatory compensation of sea-level rise-associated losses in low-lying nations in the climate change context.⁸² The pool, to be set up under the auspices of the UNFCCC, was to compensate:

- (i) in situations where selecting the least climate sensitive development option involves incurring additional expense and
- (ii) where insurance is not available for damage resulting from climate change.⁸³

There was to be a formal administering body which would collect contributions and administer payouts.

⁷⁸ Global Facility for Disaster Reduction and Recovery, above n 76, 1.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid and Ghesquiere et al, above n 77.

⁸² Intergovernmental Negotiating Committee, 'International Insurance Pool', UNFCCC, 2nd Sess, UN Doc A/ AC.237/Misc.1/Add3 (18 June 1991); also Linneroth-Bayer and Mechler, above n 68, 623f.

⁸³ Intergovernmental Negotiating Committee, above n 82.

This proposal, for the first time, suggests that insurance in the climate change context is not only about adaptation and risk management, response or pooling but also about compensation and therefore corrective justice. Contributions to fund the scheme, importantly, are not envisioned to be made by affected countries but by those who, overall, have contributed most to global warming and with it an increase in the necessity for addressing harm, loss and damage. And they are envisioned to be mandatory. However, the proposal also presents several obstacles – both practically and morally: Practically, the valuation of property and other processes envisioned by the scheme may prove costly and time-consuming.⁸⁴ Morally, it is never made quite explicit why the proposal suggested a financial compensation mechanism for only one type of loss driver – sea-level rise, or for one geo-political entity – small island and low-lying states.

Dealing with some of these shortcomings, AOSIS has since expanded its vision for no-fault compensation in the climate change context, including through insurance. Its 2008 *Multi-Window Mechanism to Address Loss and Damage from Climate Change* consists of the following three components:⁸⁵ First, insurance is to counter the particular financial exposures emanating from climate change harms in all vulnerable countries, including small island developing states (SIDS). AOSIS thereby acknowledges that insurance must indeed cover the losses not only of one subset of vulnerable countries or one type of loss driver. Secondly, a rehabilitation/compensation component would address negative impacts of climate change that are progressive and slow-onset, including sea-level rise and ocean acidification, and which may not be insurable but which must be compensated for. A third component,

⁸⁴ For more, see also Linneroth-Bayer and Mechler, above n 68, 624.

⁸⁵ See Alliance of Small Island States, *Proposal to the AWG-LCA: Multi-Window Mechanism to Address Loss and Damage from Climate Change Impacts*, UN Doc A/AC.237/15 (6 December 2008) 1f; henceforth also 'Multi-Window Mechanism'.

risk management, was to facilitate both risk management and risk assessment and was to feed into the other two components.

Importantly, the Multi-Window Mechanism stipulates that funding must collectively come from Annex I parties to the UNFCCC, with respective levels of contribution tied to emissions and ability to pay.⁸⁶ It outlines how the responsibility for such funding is supported by a number of international obligations, including state responsibility, common but differentiated responsibilities and the polluter pays principle.⁸⁷ In the spirit of no-fault compensation and ‘rough’ corrective justice, funding the scheme does not arise for one particular entity which is specifically liable but collectively for all those who can be argued to have contributed to climate change and its effects in significant ways. The Mechanism is envisioned to be situated under the umbrella of the UNFCCC, with various sub-entities providing administrative and technical support.⁸⁸

Work Programme on Loss and Damage

AOSIS’s has continued to advocate its Multi-Window Mechanism, though it has not been implemented. However, developments concerning the possibility of no-fault compensation or ‘rough’ corrective justice in the ongoing climate change negotiations are worth considering for their corrective justice potential:⁸⁹ As has been mentioned, the Bali Action Plan had deservedly elevated climate change

⁸⁶ Ibid, 3. Although note that AOSIS also suggests that funding comes from ‘additional contributions’ and other ‘sources’; Ibid.

⁸⁷ Ibid. The relevance of the first and third to compensation in the climate change context were discussed in the previous chapter; common and differentiated responsibilities will be analysed in the context of distributive justice and international law in the following chapter.

⁸⁸ Ibid, 4.

⁸⁹ See also Roda Verheyen, ‘Tackling Loss and Damage: A New Role for the Climate Regime?’ (Germanwatch, 2012) 4 and see also Ilona Millar, Catherine Cascoigne and Elizabeth Caldwell, ‘Making Good the Loss: An Assessment of the Loss and Damage Mechanism under the UNFCCC Process’ in Michael B Gerrard and Gregory E Wannier (eds), *Threatened Island Nations: Legal Implications of Rising Seas and a Changing World* (Cambridge University Press, 2013) 433.

adaptation to a more prominent place within the international climate change negotiations, joining mitigation as an important task for enhanced international action. However, in recent years, a third possibility has been raised, by AOSIS and many other particularly vulnerable countries – that climate change abatement activity is insufficient, that adaptation is not a panacea to deal with all potential detrimental consequences of climate change and that therefore due consideration must be given also to a loss and damage mechanism by which adaptation-resistant losses and damage can be recovered (without having resort to an international court or tribunal).⁹⁰ A first significant expression of the concept of ‘loss and damage’ in the international negotiations emerged with the Cancun Agreement in 2010 which acknowledged, at least,

the need to strengthen international cooperation and expertise in order to understand and reduce loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events.⁹¹

It further listed the following ‘events’ as possibly leading to loss and damage: sea-level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity and desertification.⁹² More particularly, it was agreed to

establish a work programme in order to consider, including through workshops and expert meetings, as appropriate, approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change.⁹³

In Durban in 2011, the Conference of the Parties then stipulated more concretely that it

⁹⁰ See Verheyen, above n 89, 3.

⁹¹ United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 – Part Two: Action Taken by the Conference of the Parties at its Sixteenth Session*, UN Doc, FCCC/CP/2010/7/Add.1 (15 March 2011) 6, para 25. Though note that the Multi-Window Mechanism also expressly mentions ‘loss and damage’, as does the Bali Action Plan.

⁹² Ibid.

⁹³ Ibid, para 26.

[a]ppreciates the need to explore a range of possible approaches and potential mechanisms, including an international mechanism, to address loss and damage, with a view to making recommendations on loss and damage to the Conference of the Parties for its consideration at its eighteenth session [...].⁹⁴

A 'work programme' to develop possible recommendations soon emerged, framed around three areas of enquiry:

1. Thematic Area 1: Assessing the risk of loss and damage associated with the adverse effects of climate change and the current knowledge on the same;
2. Thematic Area 2: A range of approaches to address loss and damage associated with the adverse effects of climate change, including impacts related to extreme weather events and slow onset events, taking into consideration experience at all levels;
3. Thematic Area 3: The role of the Convention in enhancing the implementation of approaches to address loss and damage associated with the adverse effects of climate change.⁹⁵

Roda Verheyen notes that although several international and regional activities and discussions were quickly planned around areas one and two, this was not the case for area three, although it has been the subject of submissions by various stakeholders.⁹⁶

Perhaps predictably, trying to progress the loss and damage 'cause' has not been easy. Many developed countries, in particular, have resisted its further progression in the international climate change negotiations. What is not lost upon them is that the language of loss and damage may 'ultimately [be] about liability and potentially compensation as well'.⁹⁷ Ed Davey, the UK's Secretary of State for Energy and Climate Change has warned in this context that '[w]e should be cautious about saying we are strictly liable for some particular event or some particular change, but that does not mean we shouldn't work with others to try to *help* some of the poorest

⁹⁴ United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Seventeenth Session, Held in Durban from 28 November to 11 December 2011 – Part Two: Action Taken by the Conference of the Parties*, UN Doc FCCC/CP/2011/9/Add.2 (15 March 2012) 6, para 5.

⁹⁵ Ibid, 6f.

⁹⁶ Verheyen, above n 89, 4.

⁹⁷ Saleemul Huq, quoted in Megan Rowling, 'Countries Clash over Loss and Damage at UN Climate Talks', AlertNet (online), 4 December 2012 <<http://www.trust.org/alertnet/news/countries-clash-over-loss-and-damage-at-un-climate-talks>>.

people in our world adapt to the impact of climate change.’⁹⁸ In other words, there are efforts underway to de-emphasise the compensatory, corrective potential of a prospective loss and damage mechanism and to keep it on the negotiation agenda as an issue of adaptation (even charity – ‘help’). In Doha, in late 2012, the COP nevertheless agreed to ‘undertake activities’ that would ‘explor[e] possible institutional arrangements, such as an international mechanism [...] to address loss and damage associated with the impacts of climate change’.⁹⁹ And yet, many issues will need clarification: where financial resources for a potential international mechanism would come from (for corrective justice purposes, they would have to be tied in some ‘rough’ way to emissions), on what basis they would be sourced and whether they should be ‘additional’ to current aid.¹⁰⁰ The establishment of a compensatory mechanism, including no-fault insurance,¹⁰¹ under the UNFCCC umbrella therefore remains uncertain, though not off-the-agenda.

5. Microinsurance and Climate Change-Related Compensation

International insurance proposals have made great strides in developing insurance as a possible response model for the detrimental impacts of climate change. They have combined pay outs with risk reduction measures, insurable losses with uninsurable losses and, certainly in the case of AOSIS, conceptualised insurance also as a

⁹⁸ Ed Davey, quoted in Rowling, *ibid* [italics by thesis author].

⁹⁹ United Nations Framework Convention on Climate Change, *Approaches to Address Loss and Damage Associated with Climate Change Impacts in Developing Countries that are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity*, UN Doc FCCC/CP/2012/L.4/Rev.1 (8 December 2012) 5, para 12a.

¹⁰⁰ See, eg, Sam Bickersteth, Mairi Dupar and Dan Hamza-Goodacre, *Opinion: Doha Talks Highlight Loss and Damage – And Leave Much Work Ahead* (13 December 2012) <<http://cdkn.org/2012/12/opinion-doha-talks/>>.

¹⁰¹ In the context of the work programme on loss and damage AOSIS’s Multi-Window Mechanism remains important and is debated, so insurance is part of that agenda; see Verheyen, above n 89, 4.

potential compensatory mechanism in the climate change context. A further matter which warrants attention is the possible role of micro-insurance, which covers small, personal asset losses, rather than the public losses sometimes emphasised in climate change-related insurance proposals. This is important in the displacement context, as it might well be small, personal losses that precede displacement and not only those related to damage to public assets. The importance of microinsurance and similar financial mechanisms to a 'rough' corrective justice will therefore be analysed in the following sub-sections.

What is Microinsurance?

In his comprehensive study of microinsurance, Craig Churchill outlines its purposes, goals and general mechanisms:¹⁰² Microinsurance provides a more formal way for low-income people and those making their livelihood informally to provide protection in relation to a variety of risk factors. As is the case with other types of insurance, a premium is usually paid (in this case a small one), in return for which there is some certainty to recoup losses when certain events have occurred. What is 'micro', in other words, are contributions to insurance and not necessarily the potential risks facing contributors.¹⁰³ Some microinsurance schemes are implemented in the context of 'social protection', as outlined above, others are set up as profit-seeking, commercial enterprises.¹⁰⁴ At times, the public and private sector co-operate to establish microinsurance programmes. Churchill notes, for example, a

¹⁰² Craig Churchill provides these introductory pointers in Craig Churchill, 'What is Insurance for the Poor?' in Churchill, above n 54, 12, 13ff.

¹⁰³ Ibid, 13.

¹⁰⁴ Ibid, 15. Some deal with 'unbanked' customers, those without any access to the banking sector or banks accounts, etc. See, eg, 'Finally, Micro-insurance Takes off in Nigeria', *This Day Live* (online), 27 November 2013 <<http://www.thisdaylive.com/articles/finally-micro-insurance-takes-off-in-nigeria/165284/>>.

partnership between German insurer Allianz, the United Nations Development Programme and the German Gesellschaft für Technische Zusammenarbeit (a major aid organisation), who came together to offer a microinsurance scheme in both India and Indonesia.¹⁰⁵ Many other channels to deliver microinsurance exist and access to microinsurance is growing: Thomas Loster and Dirk Reinhard note, for example, that access to microinsurance policies grew by eighty percent in the span of just a few years up to 2009 in Africa.¹⁰⁶ They further note that such policies, importantly, already cover risks that will also grow with climate change.¹⁰⁷ The next section will analyse in greater detail a number of the more prominent microinsurance schemes around the world, paying particular attention to their relevance in the climate change compensation context.

Targeting Specific Climatic Events, Developing Triggers, Preventing Moral Hazard

A first scheme to note is one implemented in Malawi in 2005, which is important for three reasons: first, it targets compensation for losses related to a specific type of climatic event also known to be exacerbated with climate change – drought; secondly it targets compensation for losses in relation to a slow-onset climatic event, and not sudden disasters, so often contemplated in the climate insurance literature; thirdly, it accounts for the possibility of moral hazard (risk taking behaviour) and has found ways to operationalize a scheme where this would be minimised. In particular, the scheme targets groundnut farmers subject to repeated, sometimes severe drought. It is operated in public private partnership, with a local farming cooperative, the

¹⁰⁵ Ibid, 13.

¹⁰⁶ Thomas Loster and Dirk Reinhard, 'Microinsurance and Climate Change' in Emanuela Morelli, Giorgio A Onnis, Walter J Ammann and Corina Suttter (eds), *Microinsurance: An Innovative Tool for Risk and Disaster Management* (Global Risk Forum Davos, 2010) 39, 39.

¹⁰⁷ Ibid, 40.

World Bank and international aid organisations all having cooperated in its establishment and implementation. Essentially, a system was set up whereby farmers paid a small insurance premium on top of loans for farming-related activities, which would lead to rapid compensation payments (on loans) when precipitation levels were registered below a certain threshold.¹⁰⁸ Farmers are thereby protected from defaulting upon loans and have more certainty to be eligible for loans, and therefore continued farming, again in future. However, with no-fault insurance schemes such as the one in Malawi, moral hazard is sometimes cited as an issue.¹⁰⁹ According to Howell et al: 'The principal weakness of no-fault schemes is the difficulty of ensuring that the [...] optimal amount of care is taken by potential loss-causers, as the links between their potential to cause loss and the costs of their actions are severed.'¹¹⁰ In other words, it is feared that insurance (and the assumed certainty of compensation) incentivises risk-taking behaviour (i.e. poor farming practices) that would otherwise not have been taken. However, the Malawi scheme was able to counter this possibility by making the trigger for compensation not what has happened on a particular farm but the reaching of a certain, pre-determined (precipitation) threshold measured objectively at regional weather stations.¹¹¹ The scheme provides a first opportunity to think about how compensation in the form of microinsurance might make a difference to those detrimentally affected by climate change and a first opportunity to think about how climate change-related losses could be compensated at the microinsurance level, that is through contributions to

¹⁰⁸ For more see, eg, Linneroth-Bayer and Mechler, above n 68, 628 and Ulrich Hess and Joanna Syroka, 'Weather-based Insurance in Southern Africa: The Case of Malawi' (Agriculture and Rural Development Discussion Paper No 13, The World Bank, 2005).

¹⁰⁹ Eg, Linneroth-Bayer and Mechler, above n 68, 628 and Daniel Clarke and Dermot Grenham, 'Microinsurance and Climatic-Related Disasters: Challenges and Options' (Foresight, 2011).

¹¹⁰ Brownwyn Howell, Judy Kavanagh and Lisa Marriott, 'No-Fault Public Liability Insurance: Evidence from New Zealand' (2002) 9 *Agenda* 135, 137.

¹¹¹ Linneroth-Bayer and Mechler, above n 68, 628.

insurance premiums that protect individuals and communities from the full brunt of such losses.

Compensation through Risk Absorption

Although not strictly ‘micro’ and not necessarily concerning climatic risks, another insurance scheme evidences that sometimes *only* external contributions make such schemes viable: Much of Turkey is prone to earthquakes, yet assets had historically been largely unprotected by insurance.¹¹² Following significant damage and major losses in relation to several earthquakes in the late 1990, the government implemented the Turkish Catastrophe Insurance Pool (TCIP), through which earthquake insurance became mandatory for many residential property owners who contribute to the scheme in accordance with their particular risk profile.¹¹³ However, importantly, the scheme only became feasible when the World Bank agreed to absorb a portion of the earthquake risk prevalent in Turkey, committing itself to injecting the TCIP with capital in instances where it could not alone meet its obligations.¹¹⁴ Risk absorption therefore provides another financial channel to make contributions to microinsurance (and other types of insurance, for that matter) in the climate change context, in addition to contributions to premium payments.

Compensation through Technical Contributions

Microinsurance schemes, like other types of insurance, depend upon the establishment of thresholds that trigger pay outs (also to avoid the aforementioned moral hazard issue). Here, a third opportunity for contributions by those who should

¹¹² Selamat Yazici, *The Turkish Catastrophe Insurance Pool (TCIP) and the Compulsory Earthquake Insurance Scheme* (2003), 1 <http://info.worldbank.org/etools/docs/library/114715/istanbul_03/docs/istanbul03/11yazici3n%5B1%5D.pdf>.

¹¹³ Ibid and Linneroth-Bayer and Mechler, above n 68, 629.

¹¹⁴ Linneroth-Bayer and Mechler, above n 68, 629.

contribute to no-fault compensation in the climate change context arises – technical contributions, rather than financial inputs towards premiums or risk absorption. Warner et al outline how in Kenya's Marsabit district it was a lack of local data which seemingly prevented triggers, and therefore microinsurance, from being established for livestock-related losses.¹¹⁵ However, eventually usable data was developed with external assistance and an insurance scheme for livestock farmers was put in place. What this means is that not only funding insurance (premiums, pay outs) itself may be vital when thinking about how compensation for climate change harm or damage might be affected but also providing technical expertise, including the development of relevant data and compensation thresholds which would allow insurance to be set up in the first place.¹¹⁶

Compensation through Contributions to Risk Reduction

The importance of combining risk reduction measures with insurance has already been noted.¹¹⁷ It has also been noted that taking such measures may be difficult (e.g. unaffordable) for affected individuals, communities or states. Implementation of risk reduction measures must therefore also be part of any compensatory insurance mechanism set up in relation to climate change. One scheme in the Horn of Africa has already successfully combined risk reduction with insurance. The scheme,¹¹⁸ called the Horn of Africa Risk Transfer for Adaptation (HARITA), was created by Oxfam in partnership with other private and public actors. It provides threshold-

¹¹⁵ Koko Warner et al, 'Solutions for Vulnerable Countries and People: Designing and Implementing Disaster Risk Reduction and Insurance for Adaptation' (Policy Brief, Munich Climate Change Initiative, 2010) 17.

¹¹⁶ See Eugene Gurenko [Senior Insurance Officer at the World Bank/IFC Insurance and Contractual Savings Unit] in Warner et al, above n 115, 18.

¹¹⁷ See, eg, Bals et al, above n 65.

¹¹⁸ See Oxfam America, *Weather Insurance* (2013) <<http://www.oxfamamerica.org/issues/private-sector-engagement/weather-insurance>> and Warner et al, above n 115, 7.

based micro-insurance to poor farmers in drought-prone Ethiopia. But importantly, it also puts risk reduction at the heart of the scheme, through farming education, water conservation and storage efforts, and erosion control, thereby building community resilience in addition to making available basic compensation for farming-related losses.¹¹⁹

Compensation through Contributions from Public-Private Partnerships

Linneroth-Bayer and Mechler introduce a microinsurance scheme¹²⁰ which evidences some of the potential benefits of public-private partnerships that could be incorporated into an international climate change insurance scheme: The scheme operates in India's Andhra Pradesh region, subject to frequent natural disasters, the displacement consequences of which have been noted elsewhere.¹²¹ Microinsurance here targets women and covers life and property risks.¹²² Importantly, the scheme exists because of the participation of both private and public actors: on the one hand, private insurance companies in India have statutory obligations to also cover low-income market segments. In fact, they are 'motivated [...] to actively pursue business with the poor'.¹²³ On the other hand, the microinsurance scheme in Andhra Pradesh was co-financed by Oxfam, which, at least initially, covered half the cost of premiums.¹²⁴ This is important for thinking about an international climate change compensation/insurance scheme in two ways: first, as has been noted before, contributions to compensation could simply be about covering premiums. Secondly,

¹¹⁹ Oxfam America, above n 118.

¹²⁰ Linneroth-Bayer and Melcher, above n 68, 628f. Also in Linneroth-Bayer et al, 'Insurance, Developing Countries and Climate Change' (2009) 34 *Geneva Papers on Risk and Insurance* 381.

¹²¹ See Oxfam India, *Climate Change Affecting Fisher Folk in Coastal Andhra Pradesh* <<http://oxfamindia.wordpress.com/human-impact/climate-change-affecting-fisher-folk-in-coastal-andhrapradesh/>>.

¹²² Linneroth-Bayer and Melcher, above n 68, 628.

¹²³ Ibid, 629.

¹²⁴ Ibid.

however, if contributing states are concerned about the financial exposure this presents, some of their responsibilities could be diverted to private insurance markets, as is the case in India. Linneroth-Bayer and Mechler argue that insurance companies there ‘appear willing to incur a loss on their microinsurance business in order to [keep their] access to the broader market.’¹²⁵

Microinsurance and Compensation

Microinsurance will undoubtedly have to be an important component of an international climate change insurance scheme. In relation to displacement, it targets the very assets (property, livelihoods, etc.) that might matter in migration decisions (the following section will elaborate this in greater detail). Already, many microinsurance schemes compensate for losses incurred in relation to climatic factors that will be exacerbated with climate change. Many such schemes are currently supported by international aid. However, as a matter of corrective justice, such schemes should be implemented as no-fault compensation for the benefit of those who suffer climate change’s consequences and by those who contribute to climate change and its effects above certain thresholds. There are many ways by which contributors could partake: covering premiums, absorbing risk, providing technical advice, implementing risk reduction measures, implementing risk pooling and developing public-private partnerships. Some of these measures could also go a long way to minimise the financial exposure to contributors. More importantly, such contributions would significantly decrease the detrimental impacts of climate change upon those who do not have the resources to counter such impacts independently.

¹²⁵ Ibid, 628f.

How this might matter in the displacement context will be the subject of analysis in the following section.

6. Insurance, Compensation and Displacement

Insurance, Compensation and Displacement

Migration is sometimes highlighted as a risk or threat management strategy; it is ‘informal insurance’ in and of itself.¹²⁶ That is not to say, however, that climate change presents no need to further think about formalised strategies or tools, including insurance, for those who have to move, or those who would like to stay even in the face of climate change impacts. In fact, as the following sections will argue, there is great scope for insurance to counter many different aspects of mobility – it could foster prevention of movement where this is desired, better coping when mobility occurs or, indeed, return. If conceived as no-fault compensation, it would have the additional benefit of affecting corrective justice in the context of mobility and thereby addressing the justice issues inherent to displacement in the climate change context. The various benefits of insurance to climate change-related people movement will now be discussed.

Deterrence, Mitigation and Prevention

First and foremost, at least in theory, a compensatory mechanism akin to insurance could have a deterrent and preventative function: if set up with the notion of correction through compensation at its heart, contributions to an insurance

¹²⁶ See, eg, Jennifer Powers, Barbara Magnoni and Emily Zimmerman, ‘Formalizing the Informal Insurance Inherent in Migration: Exploring the Potential Links Between Migration, Remittances and Microinsurance’ (The International Labour Office, March 2011) vi and Barbara Magnoni, Annette Lovoi, Julia Brown and Rebecca Thornton, ‘Risks Across Borders: A Study of the Potential of Microinsurance Products to Help Migrants Cope with Cross Border Risks’ (Inter-American Development Bank, September 2010) 2.

mechanism would come from those who contribute to climate change, certainly above certain thresholds (e.g. what are currently Annex 1 countries, as suggested in the AOSIS proposal). Where contributions are tied to levels of emissions in some way, and with it contributions to risk generation, mitigation is, arguably, incentivised in order to keep contributions low.¹²⁷ Mitigation, on the other hand, is important in relation to displacement in the sense that, at least bluntly speaking, it supports the possible prevention of impacts that contribute to displacement. The more abatement measures are incentivised for those who emit greenhouse gases excessively, in other words, the more positive the impact upon preventing people having to move.

Avoidance

Of course, insurance could have a more direct impact on displacement. Earlier in the chapter it was noted that, according to the IPCC, anthropogenic greenhouse gas emissions will lead to changes in precipitation amount, intensity and frequency, to more droughts, floods, heatwaves and storms and to rising seas. Elsewhere,¹²⁸ the thesis has also noted that there is at least some agreement that the greater occurrence of climatic extremes could contribute to increased human mobility. Finally, the fact that the impacts of climate change will be felt particularly in poorly-resourced areas and nations has been highlighted several times. However, compensation through insurance might help prevent people movement where this is desired. To illustrate how this works in practice, the following study is illuminating: Morsink et al studied the impacts of microinsurance upon poor households in typhoon-affected areas of the

¹²⁷ See also Penz, above n 6, 169.

¹²⁸ Ch 2 of this thesis.

Philippines.¹²⁹ In particular, the study authors investigated the impact of microinsurance upon a variety of coping strategies normally available to poorer people in the aftermath of a natural disaster, such as typhoons, amongst which they list 'outmigration', which they class as a 'high-stress coping strategy'.¹³⁰ What the authors found was that microinsurance undeniably 'decreas[es] the chance that households have to employ stressful coping strategies after a shock' and that it reduces post-disaster impoverishment.¹³¹ In other words, microinsurance can prevent poverty and enable people to simply move on with their lives without stressful disruption. The same would undeniably be true where insurance payouts cover major public infrastructure losses; where these are recuperated quickly and damage is reversed, destitution and thereby possible outmigration may not have to occur, or be only very temporary. An insurance scheme therefore may not only deter emitters from creating the conditions that impact negatively upon the likelihood of displacement in the first place, but importantly also minimise the effect of those impacts where they do arise.

Coping

Insurance may also play a part when movement becomes unavoidable. As was noted above, people movement can be about countering and managing risks or threats.¹³²

¹²⁹ Karlijn Morsink, Peter Deurts and Annemarije Kooijman-van Dijk, 'Impact of Micro Insurance on Vulnerability of Low Income Households in the Philippines: The Case of Typhoon Re-housing Insurance' (Paper Presented at the Second European Research Conference on Microfinance, 17 June 2011, Groningen, Netherlands).

¹³⁰ Ibid, 10.

¹³¹ Ibid, 28.

¹³² The important role of remittances is often highlighted. See, eg, Catalina Amuedo-Dorantes and Susan Pozo, 'Remittances as Insurance: Evidence from Mexican Migrants' (2006) 19 *Journal of Population Economics* 227. In the climate change context, see also, eg, Fanny Thornton, 'Regional Labour Migration as Adaptation to Climate Change: Options in the Pacific' (2009) in Michelle Leighton, Xiaomeng Chen and Koko Warner (eds), *Climate Change and Migration: Rethinking*

Undoubtedly, however, risks also increase when people move: social safety nets may have disappeared, families broken up, financial reserves might be stretched, living conditions may be poor, employment unavailable, even though employment may have been the impetus to move in the first place, and rights protection limited.¹³³ Worse, a landmark report on Migration and Global Environmental Change highlighted the possibility of those migrating in response to, or displaced by, climatic events moving from vulnerable to even more vulnerable places.¹³⁴ Insurance therefore might also have to counter some of the risks that arise from moving itself, or as part of the migration/displacee experience.¹³⁵ Some migration-linked microinsurance schemes already seek to do so.¹³⁶ For example,¹³⁷ SeguraCaixa, affiliated with major Spanish insurer La Caixa, has successfully offered an affordable (premiums start at Euro 6 per month) insurance scheme to migrants since 2008. Sixty-six thousand documented migrants, the majority from Africa and Latin America, are covered under a policy which pays up to Euro 30,000 to beneficiaries where a migrant has died, as well as some repatriation-related expenses. A similar scheme, managed by Spanish SegurIngreso, covers fourteen thousand migrants and pays an instant Euro 6,000 when a migrant has died, as well as continuous monthly payments for a specified amount of time. In El Salvador, a local insurer also provides migrant-linked insurance which covers repatriation and loss of remittances following

Policies for Adaptation and Disaster Risk Reduction (United Nations University, Institute for Environment and Human Security, 2011) 81.

¹³³ See, eg, Powers et al, above n 126, vi and 16 and Magnoni et al, above n 126, 2.

¹³⁴ Foresight, 'Migration and Global Environmental Change: Final Report (Government Science Office, UK, 2011).

¹³⁵ Also Powers et al, above n 16, vi.

¹³⁶ Powers et al, above n 126 and Magnoni et al, above n 126 outline many of these.

¹³⁷ The following two are outlined by Powers et al, above n 126, 12.

a policy holder's death.¹³⁸ In Indonesia statutory obligations mean that migrant placement agencies must provide clients with broad insurance, which must cover 'death, disability, medical expenses, unpaid wages, deportation and physical abuse.'¹³⁹

These schemes, few as they are, are very innovative. However, applying them to the climate change displacement context raises challenges.¹⁴⁰ First and foremost, they cover only one type of migrant: a labour migrant who moves overseas for employment purposes. This will hardly be the only type of migrant generated by climate change. Secondly, because such schemes operate across borders, and not only in domestic settings, they face a host of challenging regulatory and legal issues.¹⁴¹ It is for these reasons that only a broader, perhaps globally-managed insurance mechanism could tackle the specific needs of those migrating in response to, or displaced by, climate change's detrimental effects. Certainly, existing schemes would have to be adapted significantly to suit requirements and priorities which may arise in the climate change context.

Return

A final area worth contemplating is the role of insurance in facilitating the return of migrants or displacees. As was mentioned in Chapter Two, not all climate change impacts are such that return is out of the question following displacement. Undoubtedly, an interstate-focused insurance scheme could assist authorities in rebuilding efforts following natural disasters, which may encourage return migration.

¹³⁸ See International Labour Organisation, *The Win-Win Potential of Microinsurance for Migrants* (2013) <http://www.ilo.org/global/about-the-ilo/newsroom/comment-analysis/WCMS_191992/lang-en/index.htm>.

¹³⁹ Ibid.

¹⁴⁰ See Powers et al, above n 126, 26ff.

¹⁴¹ Ibid, 26.

An interesting possibility is also raised in relation to microinsurance and personal asset or livelihood protection:¹⁴² as is the case in many poorer parts of the world, microinsurance schemes operate also in parts of Kenya, where farmers are compensated for farming-related losses resulting from climatic events (especially drought) through an initiative that operates in public/private partnership. Not only is this creating certainty for those who farm, thereby possibly impacting on migration push factors, but it is also reported that the certainty thus created encourages those who have already left to return.¹⁴³ Whereas rural-to-urban push factors, related to both climatic and other causes, exist in Kenya as they do elsewhere, leaving many with little choice but to lead an uncertain existence in the city, the possibility of easing farming-related uncertainties through insurance and compensation has meant that some have been able to return both to rural life and to a less-precarious existence.¹⁴⁴

Final Words

Insurance may be of direct benefit in the climate change displacement context. It could prevent displacement where this is desired, enable movement that is better supported where it takes place, or help those who want to return. Peter Penz has argued that insurance-based compensation should also support hosting communities (and states) that shelter migrants or displacees.¹⁴⁵ The refugee literature, certainly, supports the sometimes detrimental impacts displaced persons and the camps that

¹⁴² See Kagondou Njagi, 'Kenya's Urban Poor Feel the Rural Pull as Insurance Makes Farming Viable', *AlertNet* (online), 5 March 2013 <<http://www.trust.org/alertnet/news/kenyas-urban-poor-feel-the-rural-pull-as-insurance-helps-makes-farming-viable/>>.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Penz, above n 6, 170f.

house them have on host communities and their environment.¹⁴⁶ Such communities must also be supported (compensated).

However, it is one thing to say that insurance-based compensation has the potential to impact positively in relation to displacement; it is another to ensure that it operates correctively, whereby those who play at least a part in increasing risk factors with potential displacement consequences are responsible for contributions to compensation where risks have turned into actual losses or damage. A final section will now consider opportunities to operationalize insurance internationally as a compensatory mechanism.

7. Factors in Operationalizing No-Fault Compensation through Insurance

Climate change will lead to substantial worldwide damage and losses in future, according to a 2012 study totalling USD 1.2 trillion per year.¹⁴⁷ Single climatic events, such as Hurricane Sandy, which wreaked havoc (and also compelled displacement, at least temporarily) along the United States' Eastern Seaboard (and elsewhere in the region) in 2012, are known to generate significant damage already – in the case of Sandy, USD 50 billion worth in the US alone.¹⁴⁸ Insurance must (does/will), undoubtedly, play a role in recovering at least some of the losses thus created. AOSIS, in particular, has argued that a loss recovery mechanism must also urgently be set up internationally and as a matter of compensation. The current

¹⁴⁶ See, eg, Jean-Francois Maystadt and Philip Verwimp, 'Winners and Losers Amongst a Refugee-Hosting Population' (Discussion Paper No 2009/34, International Association for Research and Teaching (ECORE), 2009).

¹⁴⁷ See Climate Vulnerable Forum, 'Climate Vulnerability Monitor: A Guide to the Cold Calculus of a Hot Planet' (2012) 17.

¹⁴⁸ Paul Cox, 'World Faces Mounting Damage from Disasters', AlJazeera (online), 02 June 2013 <<http://www.aljazeera.com/indepth/features/2013/05/20135278951818557.html>>.

section will tease out the different key elements that must be integrated or considered in such a mechanism:

Facility

Naturally, there must be some kind of body or facility which could administer an insurance mechanism. Several different options have been proposed: Linneroth-Bayer and Mechler have argued that either a stand-alone facility could emerge or that operationalization of insurance is affected through already existing actors (private, public and/or non-governmental, national and international), possibly in partnerships.¹⁴⁹ A similar proposal is made by Bals et al.¹⁵⁰ AOSIS's Multi-Window Mechanism would create an integrated three-part system: a) a technical facility, which could establish, for example, payout thresholds and advise countries on their risk management and compensation options; b) a financial facility, which would collect, manage and pay out funds; and c) an administrative body-(operating under the auspices of the UNFCCC Secretariat), which would provide oversight and general administrative support.¹⁵¹ Peter Höppe has also outlined the particular role that could be played by an international insurance facility; for example, to collect and manage premiums, negotiate reinsurance, and assess and facilitate potential payouts.¹⁵² He suggests, however, that risk itself should not, ultimately, be borne by such an entity but be diverted to financial and insurance markets.¹⁵³

Source of Funds

¹⁴⁹ Linneroth-Bayer and Mechler, above n 68, 626.

¹⁵⁰ Bals et al, above n 65, 6.

¹⁵¹ See Alliance of Small Island States, above n 85, 4.

¹⁵² Peter Höppe, 'Climate Risk Insurance: Suggestions for Compensation-Based Climate Risk Insurance' (Presentation at the Climate Risk Insurance Side Event, Bonn, 11 June 2008) slide 5.

¹⁵³ Ibid.

As was outlined before, many international climate change insurance proposals suggest that funds are derived voluntarily, through assistance from wealthy countries.¹⁵⁴ It is AOSIS that has made a particularly strong case that, given responsibilities for climate change, this is not enough and that funding should therefore be mandatory for wealthy countries based on emissions and ability to pay.¹⁵⁵ Höpfe also makes the case that funding international climate change insurance is the responsibility of countries who have contributed to emissions above certain thresholds and who could, for example, contribute through profits derived from emissions trading.¹⁵⁶ However, several difficulties in responsibility allocation to countries were raised in the previous chapter (fault-centered corrective justice) and would also have to be considered in relation to insurance. Penz also notes rightly that, as much as the ethical, and even practical case for mandatory contributions to an insurance scheme from high emitters can be made, in practice, 'there is no enforcing authority that can compel states to join and submit to such a system.'¹⁵⁷ Although he notes that this does not diminish their 'ethical responsibilities',¹⁵⁸ which should spur them to partake.

Macro or Micro

Any insurance-based mechanism would have to integrate country-level and more microinsurance-level compensation. Country-level assistance would help with major public infrastructure losses and microinsurance with smaller, personal losses. Recuperation of losses in relation to both have consequences for displacement.

¹⁵⁴ See, eg, Linneroth-Bayer and Mechler, above n 68 and Bals et al, above n 65.

¹⁵⁵ See, Alliance of Small Island States, above n 85.

¹⁵⁶ Höpfe, above n 152, slides 4 and 5.

¹⁵⁷ Penz, above n 6, 171.

¹⁵⁸ Ibid.

Whether the two streams are operated through separate mechanisms would have to be agreed.

Triggers

Insurance payouts would be triggered by certain events occurring or certain thresholds being surpassed (this prevents moral hazard). There are justice considerations here as well: insurance is meant to be a compensatory mechanism that avoids lengthy and complicated liability claims, giving beneficiaries relatively speedy access to compensation. In the climate change context this is important: the more rapid the pay out the sooner the detrimental consequences of a calamitous event can be countered (and displacement possibly avoided or return enabled faster). Several proposals highlight the importance of this and argue that trigger levels must be pre-established in order for lengthy payout negotiations to be prevented.¹⁵⁹ To devise a fair system, Höppe also argues that triggers and payouts should be linked to the different economic circumstances prevalent in each country and not some blanket or generic assessment of the impact of certain events.¹⁶⁰ He, finally, suggests triggers that relate not only to the country context but also to individuals, for example homelessness or personal injury,¹⁶¹ which might be relevant in the displacement context and could be compensated through microinsurance.

Does Causality Matter?

The chapter has argued that causality matters less in no-fault compensation, as it does not rest on establishing fault, or a particular faulty entity, making insurance a

¹⁵⁹ See, eg, Linneroth-Bayer and Mechler, above n 68, 625 and Alliance of Small Island States, above n 85, 4 and Höppe, above n 152, slide 8.

¹⁶⁰ Höppe, above n 152, slide 13.

¹⁶¹ Ibid, slide 16.

useful compensatory mechanism to have investigated in the climate change displacement context. However, causality is not to be ignored entirely in an international no-fault insurance scheme. First, as has been noted, responsibility bearers (states) cannot be compelled to partake in a compensatory insurance scheme and may wish to 'hide behind' causality issues analysed in the previous chapter to argue that they have no mandatory responsibilities towards such a scheme either. Secondly, there are the causal issues that remain in relation to climate change itself and in relation to displacement. Chapter Two highlighted that it may be possible to show how the risk of a certain event having occurred might have been increased by climate change. However, absolutely attributing an event to climate change remains challenging. Chapter Two also highlighted the complex factors that might interact with a climatic event to lead to displacement. Any compensation scheme, even no-fault insurance, would still have to grapple with such uncertainties and complexities to a degree. Although not based on particularised fault, some kind of link, even if not strong, between event and consequence (i.e. emission and harm) may have to be establishable. Despite such challenges, the potentially emerging loss and damages mechanism under the umbrella of the UNFCCC insinuates that the international community must now take the leap and accept that irreversible loss and damage will occur in the climate change context, that this must be compensated and that contributions to such a mechanism must come from those who have greater responsibility for causing anthropogenic climate change in the first place.

8. Conclusion

Insurance could provide an important mechanism by which climate change-related harm, loss or damage is recuperated or reversed across borders. If framed as no-fault compensation, insurance would afford a more efficient, fair and realistic compensation mechanism than those which may be available in relation to 'purer' forms of corrective justice (e.g. liability claims) – for both affected countries and individuals. Because no-fault compensation is premised on the idea that complicated causal chains (or the absence of a clearly-identifiable loss or damage causer) should be no hindrance to receiving recompense, it is particularly relevant in the climate change displacement context and the nuance and complexity which are inherent to it. Importantly, to function in a corrective justice sense, the financial (and other) contributions necessary to operationalize a climate change-related insurance scheme would have to be derived from those who contribute to anthropogenic climate change and its ill effects above a certain threshold (not as a matter of strict or direct liability but as an acknowledgement of at least some contribution to harm). Efforts to devise such a scheme are underway, although they are hampered by significant resistance to the notion that anthropogenic climate change raises the possibility of corrective justice and not only some more generalised, voluntary form of assistance.

Of course, potential contributors are concerned about the financial implications of compensation. However, contributions to an insurance/no-fault compensation scheme could be minimised by resorting to cost-saving measures such as public-private partnerships, risk pooling and risk reduction. Financial contributions could also be supplemented with contributions for the necessary technical expertise required to initiate and manage an insurance scheme. And of course, participants could reduce their contributions by curbing greenhouse gas emissions, which would

go a long way towards preventing anthropogenic climate change and its effects (including those who contribute to displacement), and therefore reduce the need for compensation.

Ultimately, insurance will impact positively particularly in the context of climate change-related people movement. There is the possible mitigation effect just mentioned, which might be achieved if insurance is set up as a compensatory mechanism and which would allow more people to stay rather than to move. More concretely, because insurance usually allows losses to be recuperated relatively quickly, livelihoods may well be re-established before moving becomes the only response to deal with a climatic event. This would also ensure that more people can stay than would otherwise be the case. Even those who cannot stay could be incorporated into insurance-based compensation. Basic migration-linked insurance schemes already compensate certain categories of migrants (or their families) for certain losses. Other insurance-type schemes have proven to encourage return migration. In order to respond to people movement in the climate change context, however, isolated schemes that already exist must be broadened and preferably operationalized under a single mechanism that would provide more certainty. Several important factors in operationalizing an international climate change insurance mechanism have been discussed.

Nevertheless, any kind of compensation remains a politically sensitive notion to advance. For the time being, greenhouse gas emitters continue to be able to shirk their responsibilities, in part because of the many causal uncertainties which make implementation of corrective justice ('pure' or 'rough') in relation to climate change harms such as those that arise in relation to displacement difficult to realise. Rougher understandings of corrective justice, as the chapter has shown, could certainly

overcome some of these hurdles, but corrective justice and compensation nonetheless remain a challenge – theoretically, practically, politically and legally. The thesis will therefore now turn to a different justice construct, to investigate whether displacement in the climate change context may be addressed better via distributive justice. Rather than looking at the phenomenon through the lens of harm, loss or damage, or compensation, the following two chapters will seek to look at it as a possibly disproportionate burden, which requires addressing via a different set of mechanisms than is the case under corrective justice.

CHAPTER 7

Distributive Justice: Cost Distribution

*What is just is what is proportional, and what is unjust is what violates the proportional.*¹
(Aristotle)

1. Introduction

The previous two chapters dealt with the question of responsibilities in relation to climate change and displacement from the perspective of corrective justice and with it the possibility of correction or compensation of harm, loss and damage. This and the following chapter will deal with the question of responsibilities based on the notion that costs and burdens emanating from anthropogenic climate change's detrimental impacts are unfairly distributed, including in relation to displacement, which requires redistribution in favour of those unfairly burdened as a matter of distributive justice. The present chapter, in particular, will investigate whether the uneven distribution of benefits arising from the burning of fossil fuels (and the emission of greenhouse gases as a result of other processes engaged in by humans), coupled with the uneven distribution of ill-effects arising from this, raises special obligations (both moral and legal) for those who engage in practices that lead to significant greenhouse gas emission levels to assist through financial transfers those more likely to be ill-affected by it (in particular displacees or those affected by displacement). The chapter argues that, essentially, the international climate change regime is based on this premise already – that certainly *countries* with roughly the greater responsibility for, and roughly greater benefit from, the processes leading to

¹ Aristotle, *Nicomachean Ethics* [trans. David Ross (Oxford University Press, 1998)] bk5, ch3.

anthropogenic climate change have a responsibility to assist those that have not benefitted and that may be burdened and more vulnerable to climate change impacts, in particular through the provision of financial assistance for the purposes of adaptation. The responsibility for providing the resources required for adjustment measures necessary to cope with detrimental climate change impacts, it has been acknowledged, in other words, rests with those who have the greater responsibility for global warming and that have benefitted from practices which are causally linked to it. This is fundamentally important for displacement, which along with migration and relocation has become an issue which has now found some expression within the international climate change adaptation regime, making it eligible to attract (at least a limited array) of financial and other resources from distributive mechanisms now established to address adaptation needs in less well-off countries. This means that at least some of the burdens arising in relation to displacement in the climate change context may very well find resolve distributively through the provision of financial assistance.

The chapter opens with a section which highlights the unequal distribution of climate change-related burdens and benefits. It will show how this evidences distributive injustices in the spatial sense – some will be burdened more than others, and in the moral sense – some will be burdened whilst others have contributed to those burdens and benefitted from processes that burden others. The chapter will then highlight distributional issues in relation to climate change and people movement, such as displacement, more specifically. Later sections of the chapter will engage with the extent to which international law in general is imbued with distributive justice notions and, more particularly, how the international climate change regime incorporates distributive justice (the discussion here will also be

underpinned by the theoretical analysis provided in Chapter Four). The chapter will show how distributive justice indeed underpins that regime and how this is important for displacement. A final section will investigate the international adaptation finance architecture, through which distributive goals, certainly concerning the costs associated with climate change-related burdens, should, arguably, be operationalized.

The chapter's overarching purpose is to show that the international climate change regime, in particular as concerning climate change adaptation, is based broadly on distributive justice principles, that displacement (along with migration and relocation) feature within this framework, making some of the costs and burdens that arise in relation to it eligible for funding, but that the distributive potential of the framework is hampered significantly by the ongoing concerns and uncertainties over the operationalizing of the actual funding of the framework. Whether climate change and displacement is an issue that will find resolution in distributive fashion through financial transfers therefore remains somewhat unclear.

A final point is important to mention: this chapter will largely be limited to discussion of the possibility that distributive justice is enacted in relation to displacement through financial transfers within the international adaptation (finance) regime. It is important to acknowledge that financial transfers and adaptation assistance are not detached from other distributive issues, especially those relating to participation. However, the scope of this chapter will not permit their mention more than in passing.

2. The Differentiated Spread of Climate Change Burdens and Benefits

The fact that climate change burdens and benefits will be spread unevenly is widely noted. The Intergovernmental Panel on Climate Change (IPCC) has highlighted that ‘those in the weakest economic position are often the most vulnerable to climate change and are frequently the most susceptible to climate-related damages, especially when they face multiple stresses.’² It also notes certain regions and topographical areas as more vulnerable: Africa, mega deltas, small islands, high-mountain and dry areas.³ Relying on the IPCC, Maxine Burkett has argued that the livelihoods bases of the poor in particular will be impacted by climate change: fisheries, coastal systems and dryland agriculture.⁴ At the same time, the majority of greenhouse gas emissions linked to human activity do not come from poor countries but those that are mostly well-off: just seven countries generate about two thirds.⁵ Chapter Five noted that significant lifestyle benefits have emanated from such emissions over time for inhabitants of many wealthy countries. Eric Neumayer, for example has argued that ‘[t]here can be no doubt that the development of the ‘Northern’ countries was eased, if not made feasible in the first place, by having had the possibility of burning large amounts of fossil fuel with the consequence of an accumulation of carbon dioxide in the atmosphere’.⁶ In the meantime, contributions to atmospheric greenhouse gas accumulations by the majority of developing countries have been insignificant, yet their vulnerabilities increase on account of the

² Intergovernmental Panel on Climate Change, ‘Synthesis Report’ in *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) s 5.2.

³ Ibid.

⁴ Maxine Burkett, ‘Climate Reparations’ (2009) 10 *Melbourne Journal of International Law* 509, 514; relying on the IPCC’s Fourth Assessment Report.

⁵ John H Knox, *Climate Change and Human Rights* (BePress, 2009) 38. Note that the European Union is counted as one entity here and that China and India are included.

⁶ Eric Neumayer, ‘In Defense of Historical Accountability for Greenhouse Gas Emissions’ (2000) 33 *Ecological Economics* 185, 189.

actions of others.⁷ The IPCC notes, for example, that ‘less than 1% of global greenhouse gases [stem from] small islands [and yet they] need to reallocate scarce resources away from economic development and poverty alleviation’.⁸ Several distributional issues arise from this: First, there are inequities simply in the spatial distribution of climate change-related burdens; poorer people and their livelihoods will be disproportionately affected. Secondly, however, there are distributional issues in the ethical sense; only some have disproportionately contributed to creating the burdens experienced by others, whilst often enjoying lifestyle benefits that have only been derived from activities that create those burdens in the first place. Distributive justice may raise demands that such inequities are addressed. Later sections of this chapter will discuss how justice theory indeed supports distribution in the climate change context, and also analyse opportunities for this under international law. The following sub-section first addresses how the displacement burden more specifically may be distributed unjustly.

The Differentiated Spread of the Climate Change and Displacement Burden

Poorer people and their livelihoods are more likely to be affected by the impacts of anthropogenic climate change. The same is to be noted in relation to climate change and mobility, including displacement. People movement is often ‘a response to inequalities in the spatial distribution of opportunities, be they economic, social, cultural, political or [indeed] environmental.’⁹ Climate change may magnify such

⁷ See, eg, Burkett, above n 4, 514.

⁸ Nobuo Mimura, Leonard Nurse, Roger McLean, John Agard, Lino Briguglio, Peneshuro Lefale, Rolph Payet and Graham Sern, ‘Small Islands’ in Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 690.

⁹ Cecilia Tacoli, ‘Migration and Adaptation to Climate Change’ (Sustainable Development Opinion, International Institute for Environment and Development, 2007) 1.

inequalities. A report concerning migration and global environmental change published by the United Kingdom's Foresight Programme in 2011 noted the uneven spatial distribution of populations vulnerable to climatic, environmental and other impacts, and therefore susceptible to migration or displacement. Unsurprisingly, the report locates such populations in areas also noted in the previous sub-section for their general vulnerability to climate change impacts – drylands, mountain areas and low-lying deltas and islands. Concerning drylands, the Report argues that although drylands occur also in wealthy countries, they are located disproportionately in poorer countries, with one study suggesting that 90 percent of dryland populations are located in developing countries.¹⁰ The report then notes that areas prone to drought and variable or unpredictable precipitation (drylands) 'frequently experience net outmigration',¹¹ Populations living in mountain areas are also more often the inhabitants of countries classed as low-income or emerging and there is significant evidence of outmigration from such areas for reasons that include environmental ones.¹² Finally, regarding low-lying coastal areas and small islands, the report notes that poverty and livelihood insecurities drive people movement to and from such areas, with climate change increasing the risk that such movement will place people in more vulnerable circumstances, which some cannot escape.¹³

Migration responses to, or displacement consequences of, climatic change may therefore be borne disproportionately (though not exclusively) by people living in poorer areas and developing countries, who may lack the socio-economic resilience to stay in the face of changing climatic conditions. Movement may or may not occur,

¹⁰ Foresight, 'Migration and Global Environmental Change: Final Report' (Government Science Office, UK, 2011) 68; citing Uriel Safriel and Zafar Adeel, 'Dryland Systems' in Rashid Hassan and Robert Sholes (eds), *The Millenium Ecosystems Assessment: Ecosystems and Human Well-Being: Current State and Trends* (Island Press, 2005) 623.

¹¹ Ibid, 70.

¹² Ibid, 91.

¹³ Ibid, 80ff.

but when people go, this may also be under conditions of further vulnerability. The issue is therefore rightly understood as one of distributive (in)justice in the geo-spatial sense (in addition the differential distribution of benefits and burdens considered above), which requires rebalancing in favour of those unfairly burdened. The following section will analyse first how and where distributive justice features in international law generally, before considering more concretely how and if climate change burdens such as displacement may find distributive resolve under international law, particularly through the international climate change regime.

3. Distributive Justice and International Law

Demands made upon international law for the implementation of distributive justice are not new and have not only arisen in relation to the fairly recent anthropogenic climate change phenomenon.¹⁴ John Conybeare has noted three particular contexts in which international distributive justice has been demanded: first, in the context of the legacy of colonialism and the global inequalities that reverberate from it; secondly, in the context of environmental resource scarcity and, thirdly, in the context of concern over prevailing ‘global poverty and relative inequality’.¹⁵ In relation to the latter, in particular, important international human rights instruments seek to address issues of socio-economic inequality: for example the Universal Declaration states ‘[e]veryone has the right to a standard of living adequate for the health and well-

¹⁴ See, eg, Ben Saul, ‘Climate Change, Resource Scarcity and Distributive Justice in International Law’ (Legal Studies Research Paper No 09/104, University of Sydney, 2009).

¹⁵ John A C Conybeare, ‘Efficiency, Entitlements and Deservingness: Perspectives on International Distributive Justice’ (2007) 14 *Review of International Political Economy* 380, 382.

being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’¹⁶ The UN Charter demands that ‘[w]ith a view to the creation of conditions of stability and well-being [...] the United Nations shall promote [...] higher standards of living, full employment, and conditions of economic and social progress and development.’¹⁷ It is doubtful, however, that concrete legal obligations, in particular across borders, arise from this.¹⁸

Addressing post-colonialism and economic injustices which were thought to continue to arise from it, the 1970s saw a significant effort to devise a more just post-colonial economic order, driven largely by newly-decolonised and developing countries. In 1964, the United Nations Conference on Trade and Development was formed to facilitate this effort. A decade later, the Declaration on the Establishment of a New International Economic Order (NIEO) proclaimed a

united determination to work urgently for the Establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interests and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between developed and developing countries and ensure steadily accelerating economic and social development.¹⁹

Unfortunately, no legal obligations emerged from this. However, a renewed effort to address global socio-economic disparities emerged with the Millennium Development Goals (MDGs).²⁰ Although not creating binding legal obligations

¹⁶ Art 25 (1).

¹⁷ Art 56.

¹⁸ Chapter Eight of this thesis will provide a fuller discussion of this matter. The question of extra-territorial application of human rights law was also discussed in Chapter Three.

¹⁹ *Declaration of 1 May 1974 Concerning the Establishment of a New International Economic Order*, UNGA Res 3201, UN Doc A/RES/S-6 3201 (1 May 1974) para 3.

²⁰ See United Nations, *Background* (2013) <<http://www.un.org/millenniumgoals/bkgd.shtml>>.

either, they have eased successfully *some* of the burdens faced by many of the world's poor.²¹

Distributional issues concerning resources, the environment and development are tackled by international environmental law. Principle 8 of the Rio Declaration, for example, asks that states curb unsustainable production or consumption and do not exploit resources without bounds, which would lead to a higher quality of life for all. Undoubtedly, this is important also in the context of anthropogenic climate change. Distributional issues are further acknowledged by conceding that poorer nations have special needs in relation to the environment and to development, which might have to be addressed through 'international action',²² and that sustainable development must depend on poverty eradication, including through inter-state cooperation for the benefit of those who cannot achieve this independently.²³ Many international instruments targeting particular environmental issues incorporate such notions further and questions of inter-generational distributive justice are also addressed in a number of international environmental instruments.²⁴ As much as international environmental law engages with distributive justice notions, however, relevant provisions here, too, cannot usually create binding legal obligations. Ultimately, calls for international distributive justice are widespread and some of international law is undoubtedly underpinned by distributive justice. However, because the regimes where distributive justice features are almost exclusively of a soft law nature, realisation of it in practice remains a challenge in relation to many distributive injustices, an issues which will come up again in later sections of this

²¹ See, eg, United Nations, *Millenium Development Goals: 2012 Progress Chart* (2013) <http://www.un.org/millenniumgoals/pdf/2012_Progress_E.pdf>.

²² Principle 6, Rio Declaration

²³ Principle 5, Rio Declaration.

²⁴ Saul, above n 14, 15, 17.

chapter. The chapter will now turn to how distributive issues – the distribution of responsibilities, burdens and benefits – are addressed in the climate change regime before turning to how this matters specifically in relation to displacement (and other types of people movement).

4. The International Climate Change Regime and Distribution

In order to understand how responsibilities, burdens and benefits are allocated or distributed in the international climate change regime, and therefore how distributive justice features there, two discussions have to precede analysis of the regime: First, a discussion of two types of responsibilities and, secondly, a discussion of two types of vulnerability.

Two Types of Responsibility

The international climate change regime revolves around two notions of responsibility, although a third one may now be emerging.²⁵ The first type refers to responsibility for greenhouse gas emissions that propel anthropogenic climate change. As has been noted, some nations emit significantly more than others. For the majority of them, responsibilities are engaged to conduct abatement measures that curb greenhouse gas emitting human activities, certainly beyond certain thresholds. A second type of responsibility refers to the responsibility to counter the damaging impacts that are known and anticipated to arise in connection with anthropogenic

²⁵ This refers to the responsibility for loss and damage discussed in the previous chapter.

climate change through adaptation measures.²⁶ Again, some nations are thought to carry greater responsibilities in this context than others. For some time after its establishment, the international climate change regime emphasised responsibilities in relation to the first matter over the second – that is mitigation over adaptation. Some note that the lesser attention on adaptation was long underpinned by concerns that nothing should divert attention away from mitigation, considered more vital.²⁷ Marco Grasso has argued instead that mitigation dominated because of the ‘natural science approach’ long prevalent in debates and negotiations concerning climate change, which neglected other (more human) dimensions:

On this view, mitigation has mainly to do with energy issues, which seemingly offer a more straightforward solution to climate change, according to the ultimate objective of the UNFCCC (article 2) to stabilize GHG in the atmosphere at a non-dangerous level, and are more tractable than the multiple issues entailed by adaptation policies and practices, which, furthermore, can on the contrary be perceived simply as strategies to coexist with climate change.²⁸

This arguably unfair balance has been rectified to a degree in recent years, with UNFCCC parties agreeing to ‘enhanced action on adaptation’ in addition to mitigation at their 13th Conference of the Parties (COP) in Bali in 2007,²⁹ following which at least some concrete steps have been taken to implement this. Vulnerable countries have thereby gained some certainty that there will be assistance for them to counter climate change-related burdens which they did not create.

²⁶ Simon Caney, amongst others, makes this distinction; see Simon Caney, ‘Cosmopolitan Justice, Responsibility, and Global Climate Change’ (2005) 18 *Leiden Journal of International Law* 747, 751f.

²⁷ Jouni Paavola and W Neil Adger, ‘Fair Adaptation to Climate Change’ (2006) 56 *Ecological Economics* 594, 595.

²⁸ Marco Grasso, *Justice in Funding Adaptation Under the International Climate Change Regime* (Springer, 2010), 12.

²⁹ See United Nations Framework Convention on Climate Change, *Revised Draft Decision -/CP.13: Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention: Proposal by the President*, UN Doc FCCC/CP/2007/L.7/Rev.1 (14 December 2007) para 1(c)(ii).

Two Types of Vulnerability

Responsibilities for assisting with vulnerabilities and adaptation needs in some countries have generally come to be accepted in recent years. Grasso has noted, however, that the needs which arise in relation to vulnerability and adaptation are complex: On the one hand, vulnerability is created, and adaptation necessitated, simply because of the impacts of climate change upon certain locations.³⁰ In such a context, the IPCC has described the role of adaptation to be about ‘adjustments in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.’³¹ In other words, a climatic stimulus presents the vulnerability in a particular location which is to be countered by an adaptive response (either proactively or reactively³²). However, Grasso also suggests a different view of vulnerability and of adaptation: Here what matters is not the climatic stimulus but the conditions – social, political, cultural, etc. – which exist for individuals or in communities (or states) at the time the stimulus occurs.³³ Grasso argues that one view of vulnerability is ‘biophysical, where the vulnerability of a system depends on its physical exposure to climate impacts [...], and the other social, where what matters is the ability of individuals and groups to deal with climate hazards’.³⁴ The IPCC also acknowledges this: ‘[w]hile physical exposure can significantly influence vulnerability for both human populations and

³⁰ Grasso, above n 28, 16ff and 20ff.

³¹ Intergovernmental Panel on Climate Change, ‘Definition of Key Terms’ in *Contributions of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 6.

³² Jouni Paavola and Neil Adger draw this distinction, eg, Jouni Paavola and W Neil Adger, ‘Justice and Adaptation to Climate Change’ (Working Paper 23, Tyndall Centre for Climate Change Research, University of East Anglia, 2002) 9.

³³ Grasso, above n 28, 20f.

³⁴ Ibid, 17. The environmental justice literature also often makes this point; see, eg, David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press, 2007).

natural systems, a lack of adaptive capacity is often the most important factor that creates a hotspot of human vulnerability.³⁵ It has also noted that:

The array of potential adaptive responses available to human societies is very large, ranging from purely technological (e.g., sea defences), through behavioural (e.g., altered food and recreational choices), to managerial (e.g., altered farming practices), to policy (e.g., planning regulations). Whilst most technologies and strategies are known and developed in some countries, the assessed literature does not indicate how effective various options are to fully reduce risks, particularly at higher levels of warming and related impacts, and for vulnerable groups. In addition, there are formidable environmental, economic, informational, social, attitudinal and behavioural barriers to implementation of adaptation. For developing countries, availability of resources and building adaptive capacity are particularly important.³⁶

The importance of bio-physical versus other, pre-existing vulnerabilities was also drawn in Chapter Two in relation to the factors which compel people movement in the climate change context. As will be shown, the international climate change regime recognizes that both types of vulnerability raise special obligations to assist affected countries in the climate change context.

Aristotle, Utilitarians, Rawls or Sen?

It is now possible to connect the discussion back to some of the key distributive justice theories explored in Chapter Four. Aristotle noted that distributive justice is about proportionality between separate entities. However, he envisioned proportion between *deserving* parties and not a broader scope, which makes his notion of distributive justice (and those that are strongly founded in it; i.e., Aquinas) not particularly helpful to think about the distribution of benefits, burdens and responsibilities in the climate change context (an exception is provided in the following thesis chapter). Utilitarian emphasis on the greatest good for the greatest number of people would also not necessarily address the injustices of benefit and

³⁵ Intergovernmental Panel on Climate Change, *Contributions of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 317.

³⁶ *Ibid*, 38.

burden distribution in that context. The greatest benefit from assistance provision may not be derived through channelling it to those who most need it, or assistance provision may altogether not be considered to provide the greatest benefit, as opposed to mitigation, for example, an issue which has already been raised. John Rawls provides more opportunities to analyse distributive justice responsibilities in the climate change context, given that he argued that distribution should occur in favour of the least well-off members of society. The extension of his theories by cosmopolitans such as Charles Beitz, Thomas Pogge and others to ‘international society’ was outlined in Chapter Four, which makes it particularly appealing in the climate change context. In that context, then, it could be argued that distribution should occur towards those likely to be most burdened by climate change and its impacts.³⁷ It was noted in a prior section of this chapter that this will, more often than not, be the inhabitants of poorer states. The following section will show how the climate change regime indeed envisions resource distribution, certainly amongst states, on this basis. However, Grasso, relying on his discussion concerning vulnerability presented in the previous sub-section, has shown how Amartya Sen’s conceptualisation of distributive justice would stipulate that amongst the most burdened must especially be counted those with the fewest ‘capabilities’ to counter climate change impacts.³⁸ Certainly at the inter-state level, this is acknowledged in the international climate change regime. The following section will now engage in greater detail with how the international climate change regime conceptualises the two types of responsibilities outlined, as well as differentiated access to assistance in accordance with the two types of vulnerability presented – before, in later sections,

³⁷ For a similar line of argument connecting Rawls to responsibilities for adaptation burdens, see Grasso, above n 28, 63ff.

³⁸ Ibid, 66f.

investigating how displacement and other types of climate change change-related people movement more particularly are addressed in, and may find resolve through, the regime.

Allocation of Responsibilities and Burdens in the International Climate Change Regime

Henry Shue has noted how debates about justice are dominated by questions of responsibility allocation ‘to whom’, paying lesser attention to the question of ‘from whom’.³⁹ The following sub-section, in exploring responsibilities and burdens as they arise out of the international climate change regime, and therefore the extent to which distributive justice is a feature of the regime, will address both. The sub-section will in particular look at relevant provisions in the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol.⁴⁰

From Whom?

A previous sub-section of this chapter noted varying responsibilities related to climate change. It argued, first, that responsibilities accrue for those who emit greenhouse gases which propel anthropogenic climate change. The UNFCCC Preamble recognises that

human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth’s surface and atmosphere and may adversely affect natural ecosystems and humankind.⁴¹

³⁹ Henry Shue, ‘Subsistence Emissions and Luxury Emissions’ (1993) 15 *Law and Policy* 39, 50.

⁴⁰ The first commitment period under the Protocol ended in 2012; however, a new commitment period has, in principle, been agreed, although it is not yet in force; see, eg, United Nations Framework Convention on Climate Change, *Doha Amendment* (2013) <http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php>.

⁴¹ United Nations Framework Convention on Climate Change, Preamble, para 2.

The international climate change regime therefore places upon emitters the fundamental responsibility 'to achieve [the] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system'.⁴² Mitigation duties this implies arise on the basis of 'common but differentiated responsibilities and respective capacities', which leaves little doubt that it is developed countries which 'should take the lead in combating climate change'.⁴³ The UNFCCC Preamble notes in particular that 'the largest share of historical and current global emissions of greenhouse gases has originated in developed countries,' which engages their greater responsibility.⁴⁴ Scientific uncertainty, furthermore, should not be an excuse not to act with precaution.⁴⁵ Therefore, developed countries are to implement policies and take measures that would 'limit emissions' and 'protect and enhance greenhouse gas sinks and reservoirs.'⁴⁶ On this basis, the Kyoto Protocol outlines specific mitigation responsibilities for developed countries, with the aim to stabilize, even reduce, greenhouse gas emissions.⁴⁷

In addition to responsibilities in connection to emissions and their abatement, responsibilities also arise in relation to the detrimental consequences of climate change. The 'common but differentiated responsibilities and respective capabilities' notion here expands to include the responsibility of developed countries to take the lead also in countering the adverse effects of climate change.⁴⁸ They are to cooperate with developing countries 'to better address the problems of climate change'.⁴⁹ More

⁴² Ibid, art 2.

⁴³ Ibid, art 3.1.

⁴⁴ Ibid, Preamble, para 3.

⁴⁵ Ibid, art 3.3.

⁴⁶ Ibid, art 4.2(a).

⁴⁷ Kyoto Protocol, eg, art 3.1.

⁴⁸ United Nations Framework Convention on Climate Change, art 3.1.

⁴⁹ Ibid, art 3.5.

particularly, developed countries are to 'assist the developing country Parties [...] in meeting the costs of adaptation to [the] adverse effects of climate change.'⁵⁰ Philippe Sands has argued that this 'amounts to an implicit acceptance of responsibility for causing climate change'.⁵¹ Technology transfer is also considered an important responsibility of developed countries to address the adverse impacts of climate change elsewhere.⁵²

To Whom?

A second, equally important, question which arises concerns whom responsibilities are to benefit. Here, the international climate change regime has developed a differentiated system: It recognises, first of all, that

[t]he specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.⁵³

Several types of vulnerable countries are named. The UNFCCC Preamble notes that 'low-lying and other small island countries, countries with low-lying coastal, arid and semi-arid areas or areas liable to floods, drought and desertification, and developing countries with fragile mountainous ecosystems' may be particularly vulnerable. Article 4.8 notes such countries again but adds that countries which warrant a particular response also include 'countries prone to natural disasters', 'countries with high urban atmospheric pollution' and land-locked and transit countries'. However, the climate change regime also acknowledges that vulnerability and exposure to risk is not just a matter of pre-existing geographical or topographical

⁵⁰ Ibid, art 4.4.

⁵¹ Philippe Sands, 'The United Nations Framework Convention on Climate Change' (2006) 1 *Review of European, Comparative and International Environmental Law* 270, 275.

⁵² See, eg, United Nations Framework Convention on Climate Change, art 4.5.

⁵³ Ibid, art 3(2).

features (the bio-physical world). A previous sub-section discussed that vulnerability also arises in relation to social and economic factors. Addressing this, the UNFCCC therefore acknowledges that it is ‘economic development [which] is essential for adopting measures to address climate change’⁵⁴ and that ‘economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.’⁵⁵ A whole separate paragraph is dedicated to acknowledging, ‘the special needs and special situation of the least developed countries’.⁵⁶ What, then, can vulnerable countries expect from developed countries? Having met their adaptation costs has already been mentioned. Article 4.8 of the UNFCCC also stipulates commitments to ‘funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures’. Article 1.1 defines ‘adverse effects’ as ‘deleterious effects on the composition, resilience, or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.’ A broad range of assistance measures are therefore foreseen in response to a broad range of detrimental climate change impacts.

The international climate change regime frames a number of responsibilities which relate to both mitigation and adaptation. In general, it makes most developed nations responsible for not only the financing and implementation of abatement measures but also the resourcing of measures by which poorer countries could adapt to the detrimental impacts of climate change. However, as has been noted elsewhere, the regime’s primary instrument, the United Nations Framework Convention on

⁵⁴ Ibid, art 3.4.

⁵⁵ Ibid, art 4.7.

⁵⁶ Ibid, art 4.9.

Climate Change, is a framework instrument, which does not outline concrete obligations. Regarding adaptation, then, the UNFCCC notes only that developed countries *shall* assist developing countries⁵⁷ and that they *shall* consider the provision of funding, insurance and the transfer of technology.⁵⁸ None of this binds states to concrete commitments. It is not outlined specifically how such assistance is to be sourced, to what extent and how or when it is to be disbursed. The Convention envisions that this was to be subject to further negotiations by the states parties. Some progress has been made in this regard: the Bali COP in 2007 resulted in a greater overall commitment towards adaptation assistance and significant financial commitments to international adaptation finance were declared at COP 16 in Cancun.⁵⁹ Nevertheless, none of these commitments are anchored in concrete obligations; they are voluntarily adhered to, or not. Turning responsibilities in principle into responsibilities in practice has therefore remained a significant challenge, an issue a later section of this chapter, which discusses adaptation finance, will turn to in more detail.

A Short Note on Participatory Justice

The fact that the international climate change regime does not frame responsibilities as legally binding is one obstacle to distributive justice (and, as was argued in Chapter Five, an obstacle to a state responsibility claim and therefore corrective justice as well) in relation to climate change burdens. Before turning to how the regime nevertheless enables the addressing of mobility-related issues, the chapter

⁵⁷ Ibid, art 4.4.

⁵⁸ Ibid, art 4.8.

⁵⁹ More about this in s 8 of this chapter.

will briefly discuss another obstacle to distributive justice (although it matters also in relation to corrective justice), namely participatory justice.

First, it is important to remember that the international climate change regime is about allocating responsibilities between states. That means assistance obligations are largely conceptualised in relation to vulnerable *states* (low-lying island states, disaster prone states, etc.). Many such states will hopefully ensure that any adaptation assistance allocated them is channelled to those who most need it (communities, individuals). In fact, at least one international adaptation assistance mechanism (national adaptation programmes of action (NAPAs)) proactively envisions grassroots and community involvement to ensure this.⁶⁰ However, involvement at that level is not generally fostered by the international climate change regime. As Jouni Paavola and Neil Adger note: ‘There has to be a way to elicit information on local interests and circumstances as well as to enable meaningful participation of representatives of the local in internationally coordinated adaptation measures’, particularly because ‘[m]any adaptation measures will take place at the local level and all of them will have local impacts.’⁶¹ Much more could be done to achieve this.

An additional procedural matter – or issue of participatory justice – arises in relation to the unequal ability of states parties to participate in the international climate change negotiations. As Paavola and Adger have noted, ‘[d]eveloping countries do not have the same possibilities for effective participation as developed countries’ because of their ‘small delegations’ and sometimes also because of language barriers.⁶² With the UNFCCC a framework agreement subject to further

⁶⁰ Section Seven of this chapter will engage with this in greater detail.

⁶¹ Paavola and Adger, above n 32, 15.

⁶² Paavola and Adger, above n 27, 600.

negotiation to implement its provisions, poorer states often find their ability to partake in this process hampered. Rawls, in a lengthy article dealing with Jürgen Habermas's critique of his theory of justice, including on procedural grounds, once stated that substantive and procedural aspects of justice are not isolated from each other – they 'are connected and not separate'.⁶³ In other words, distributive justice must inevitably also be about process and about participation. At the moment, the latter is often not equal in relation to the international climate change negotiations.

Final Words

The international climate change regime is undoubtedly underpinned by distributive justice, both in the Rawlsian and Senian (and also Martha Nussbaum) sense. Distribution and expenditure of resources (money, technology, expertise) is envisioned for the benefit of those considered most in need and least well-off, both because of their exposure to climate change impacts *and* vulnerabilities which relate to social, economic or cultural conditions that prevail in some countries. In principle, the distributive justice issues raised by climate change are therefore well placed to find distributive resolve through this regime. However, several matters stand in the way of distributive justice in practice: the regime does not create concrete, enforceable legal obligations but has left many matters of distribution vague – the how, when, who or what of distribution are not specifically addressed. Secondly, the regime does not foster equal participation, neither of those who will ultimately be affected by climate change – individuals – or of national decision-makers. Distributive justice is therefore not always ensured at the participatory level, an injustice given a regime which purposely left vague, and subject to further

⁶³ See, John Rawls, 'Political Liberalism: Reply to Habermas' (1995) 92 *Journal of Philosophy* 132, 170.

negotiation, many of its provisions. Nevertheless, given that the international climate change regime is underpinned by distributive justice, the following section will now explore whether the particular burden of displacement may find distributive resolve in that regime.

5. The Potential of Adaptation in Relation to Climate Change and Human Mobility

The previous section outlined how distributive justice in relation to the detrimental consequences of climate change is addressed by the international climate change regime through commitments to the provision of adaptation assistance to those burdened by the impacts of climate change and by those who, overwhelmingly, have contributed most to greenhouse gas emissions *and* benefitted the most from emitting activities. The chapter now turns to how any of this matters to climate change-induced mobility, including displacement. Can adaptation, including the international financial assistance available through international adaptation channels,⁶⁴ make a difference to relieving the displacement burden distributively? Before outlining opportunities for affected countries to seek climate change adaptation assistance in relation to people movement, the following brief section will first engage with the connection between adaptation and such movement.

Fundamentally, adaptation is connected to people movement in two ways: First, people movement itself is an adaptation strategy, which means that adaptation assistance should be channelled to enabling such movement where it is necessary or

⁶⁴ These channels will be discussed in s 7 of this chapter.

desired. Secondly, adaptive measures may well be sufficient to prevent people movement where it is not desired and adaptation assistance could therefore prevent displacement.⁶⁵ Both opportunities will now be discussed in greater detail: Jon Barnett and Michael Webber have highlighted that people movement in the climate change context may be a desirable adaptation response that could lead to greater livelihood security for those moving and for those left behind, especially where new livelihoods can be established in the new place and remittances sent back to the place of origin.⁶⁶ On this view, then, adaptation assistance should help people move, thereby increasing their personal safety and their livelihood opportunities. Several adaptation projects submitted under existing international adaptation channels incorporate this view. For example, the Maldives, a low-lying island nation in the Indian Ocean, has requested international adaptation assistance for a project which would enable it to implement better its 'Safer Island Strategy', tasked, in part, with the resettlement of individuals and communities from vulnerable to less vulnerable islands.⁶⁷ The project, in other words, views people movement itself as a necessary adaptive strategy.

On the other hand, migration, displacement and relocation create vulnerabilities. The previous chapter stressed this in connection with insurance programmes that target migrants. Michael Cernea⁶⁸ has also highlighted a multitude of vulnerabilities and ill effects which arise in connection with involuntary people movement (development-induced), for example, 'landlessness', 'joblessness', 'homelessness',

⁶⁵ See, eg, Soumyadeep Banerjee, Richard Black and Dominic Kniveton, 'Migration as an Effective Mode of Adaptation to Climate Change' (Foresight, 2011).

⁶⁶ Jon Barnett and Michael Webber, 'Accommodating Migration to Promote Adaptation to Climate Change' (Policy Research Working Paper 5270, The World Bank, 2010) eg, 24ff.

⁶⁷ United Nations Framework Convention on Climate Change, *NAPA Project Profile*, 2 <http://unfccc.int/files/adaptation/napas/application/pdf/23_mald_pp.pdf>.

⁶⁸ Michael Cernea, 'The Risks and Reconstruction Models for Resettling Displaced Populations' (1997) 25 *World Development* 1569, 1569.

‘marginalisation’, ‘food insecurity’, ‘loss of access to common property resources’, ‘increased morbidity’ and ‘community disarticulation’. The particular issues faced especially by women migrants and displacees have also been widely highlighted in the literature.⁶⁹ On this view, then, adaptation assistance should play its part to prevent a climate change-induced phenomenon that is likely not desired.⁷⁰ Looking at the Maldives again, although it realises the value of people moving as an adaptation strategy, it equally acknowledges implicitly that it is important to enable people to stay as long as they can. Several of the projects it has applied funding for reference a desire to implement measures to ensure the continued viable habitation of communities and islands, for example through the installation of water storage facilities, improved building design and the strengthening of coastal defences.⁷¹

A dual role for adaptation is evidenced in the climate change-induced mobility context. On the one hand, moving itself may be an adaptation strategy; on the other hand, implementation of adaptation strategies should preferably prevent movement. In one case, moving may ease burdens; in the other, easing burdens is meant to prevent movement. What remains to be discussed now is whether the international adaptation framework presents opportunities to alleviate either kind of burden in distributive fashion.

⁶⁹ See, eg, Susie Jolly and Hazel Reeves, ‘Gender and Migration: Overview Report’ (Institute of Development Studies, Sussex University, 2005).

⁷⁰ Colette Mortreux and Jon Barnett note the undesirability of movement in Tuvalu; see Colette Mortreux and Jon Barnett, ‘Climate Change, Migration and Adaptation to Climate Change in Funafuti, Tuvalu’ (2009) 19 *Global Environmental Change* 105.

⁷¹ United Nations Framework Convention on Climate Change, above n 67.

6. Opportunities in the International Adaptation Framework

The issue of mobility, particularly migration, displacement and planned relocation, has in recent years indeed emerged within the international climate change regime in the adaptation context. A connection between climate change and human mobility has thereby formally been made and the issue ‘has been brought to an international policy arena’.⁷² Koko Warner has outlined the emergence of mobility as a topic within the climate change negotiations and its emergence within various adaptation instruments.⁷³

Emergence of the International Adaptation Framework and of Migration, Displacement and Relocation within the Framework

A previous section noted that it was only with the Bali Action Plan in 2007 that states parties to the UNFCCC made a greater commitment to ‘*enhanced* action on adaptation’ in addition to mitigation.⁷⁴ To facilitate this, the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA) was formed, which, for a brief time following its formation, sought guidance and submissions to consider in future negotiating texts not only from states parties but also observer bodies.⁷⁵ Warner notes how this meant that not only states but various organisations were able to inform the international climate change negotiations: ‘the wider humanitarian community – including UN agencies, research and civil society – massively

⁷² See Koko Warner, ‘Migration and Displacement in the Context of Adaptation to Climate Change: Developments in the UNFCCC Climate Negotiations and Potential for Future Action’ (Foresight, 2011) 1 and Koko Warner, ‘Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations’ (Legal and Protection Policy Research Series, Office of the United Nations High Commissioner for Refugees, 2011).

⁷³ Ibid [both].

⁷⁴ See United Nations Framework Convention on Climate Change, *Revised Draft Decision -/CP.13: Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention: Proposal by the President*, UN Doc FCCC/CP/2007/L.7/Rev.1 (14 December 2007) para 1(c)(ii).

⁷⁵ Warner, ‘Migration and Displacement’, above n 72, 5 and Warner, ‘Climate Change Induced Displacement’, above n 72, 7.

mobilized in the period from 2008 to 2009 to ensure that the human face of climate change would be duly represented', including the possibility of displacement.⁷⁶ It is through such efforts that climate change-related mobility was first reflected in the assembly document compiled for COP14 in Poznan in 2008.⁷⁷ More than just a mention, it soon found firmer acknowledgement as an adaptation issue at COP15 in Copenhagen in 2009, where the COP

4. Invite[d] all Parties to enhance adaptation action under the Copenhagen Adaptation Framework taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances ... to undertake, inter alia:

[...]

(f) Measures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation, where appropriate.⁷⁸

Activities related to displacement, migration and planned relocation thereby became formally recognised as an adaptation concern, important, as it made such activities at least in theory also eligible for emerging adaptation funding.⁷⁹

Further discussions concerning climate change-related mobility led to the eventual inclusion of an only marginally-different Article 14(f) in the Cancun Adaptation Framework in 2010, which

14. Invites all Parties to enhance action on adaptation under the Cancun Adaptation Framework, taking into account their common but differentiated responsibilities and respective capabilities, and specific national and regional development priorities, objectives and circumstances, by undertaking, inter alia, the following

[...]

⁷⁶ Warner, 'Migration and Displacement', above n 72, 5 and Warner, 'Climate Change Induced Displacement', above n 72, 7.

⁷⁷ United Nations Framework Convention on Climate Change, Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA), *Ideas and Proposals on Paragraph 1 of the Bali Action Plan*, UN Doc FCCC/AWGLCA/2008/16/Rev1 (15 January 2009), para 63(g), para 112(f) and 112 (h); noted in Warner, 'Migration and Displacement', above n 72, 8f and Warner, 'Climate Change Induced Displacement', above n 72, 8.

⁷⁸ United Nations Framework Convention on Climate Change, *Work Undertaken by the Conference of the Parties at its Fifteenth Session on the Basis of the Report by the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, UN Doc FCCC/CP/2010/2 (11 February 2010).

⁷⁹ Warner, 'Migration and Displacement', above n 72, 10, 13.

(f) Measures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels.⁸⁰

Warner notes how this accounts for ‘different levels of mobility’, ‘different types of mobility’ and ‘different kinds of measures’ that could be taken by states parties.⁸¹

Distributive Justice?

Before evaluating how migration, displacement and relocation appear in the international adaptation framework in light of distributive justice principles, it is important to consider some of the debates that informed, in the background, how the issue should be framed. Warner notes that throughout the negotiations leading up to the eventual inclusion of Paragraph 4(f) in the Copenhagen outcome text, ‘some Parties suggested that an array of themes be added in to [the] paragraph, [including] human rights, mother earth, justice, compensation to vulnerable people, and other items of importance to particular parties.’⁸² Warner highlights how this quickly jeopardised having any mention of human mobility included in the text at all. Instead, she argues, mention of mobility in that outcome text and the Cancun Adaptation Framework was highly dependent on the issue being ‘couched in pragmatic, solution-oriented terms’, framed as a ‘technical issue’⁸³ and, importantly as a ‘politically feasible option’ that does not require of states parties the implementation of ‘overly complex arrangements’ or too much ‘political capital.’⁸⁴

The result is paragraph that asks states parties to support a limited array of measures

⁸⁰ United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 – Part Two: Action Taken by the Conference of the Parties – Decisions Adopted by the Conference of the Parties*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011).

⁸¹ Warner, ‘Climate Change Induced Displacement’, above n 72, 12.

⁸² Warner, ‘Migration and Displacement’ above n 72, 10.

⁸³ Warner, ‘Climate Change Induced Displacement’, above n 72, 4.

⁸⁴ Warner, ‘Migration and Displacement’ above n 72, 14.

which increase the knowledge base surrounding climate change-related mobility or which enhance cooperation or coordination.

What does this mean for distributive justice? It is a positive development that mobility-related issues have found some expression within an overall framework that is underpinned by distributive justice. In fact, its emergence in that context is hailed as a success by those who work on climate change-related mobility issues,⁸⁵ and Warner herself deserves credit for getting human mobility formally acknowledged as an adaptation matter within the international negotiations. By finding expression in the international adaptation framework, displacement and other types of people movement that arise in connection with climate change are placed within the context of instruments through which wealthier countries have acknowledged that the burdens their activities are placing on poorer countries warrant support to counter such burdens. However, the current framing of mobility within the international adaptation framework raises other questions concerning distributive justice: political sensitivities concerning migration and displacement meant that mobility arises in the adaptation framework in somewhat curtailed fashion. Only certain activities, particularly concerning knowledge, coordination and cooperation, were agreed upon by states parties to be measures that should be supported within the adaptation context. What this inevitably means is that the distributive justice potential of the international adaptation framework does not extend to those who are directly affected by displacement or those who wish to implement adaptation measures which could prevent displacement (unless this occurs in the context of coordination and cooperation, but it is not clear what this means). Their burden can likely not, for

⁸⁵ See, eg, Jane McAdam, *Climate Change, Forced Migration, and International Law* (Oxford University Press, 2012) 232.

the time being, be relieved through application of Article 14(f) of the Cancun Adaptation Framework.

Still, it is vital that some mention of human mobility has been made in that Framework. Jane McAdam has argued that this ‘provides an important recognition of the impacts of climate change on human movement, and the need for states to address this.’⁸⁶ Warner argues that ‘[e]xpert-supported processes or other fora for exploring a topic like migration and displacement in more depth and focus can bring additional insights and momentum to the UNFCCC process’.⁸⁷ On the other hand, there are those who think that ‘advocacy [concerning climate change-related people movement] within the United Nations Framework Convention on Climate Change (UNFCCC) may well have run its race.’⁸⁸ Time will tell whether human mobility as an adaptation concern in the international negotiations will be able to move beyond the scope of Article 14(f). The following section will now detail how displacement, migration and relocation have emerged as an adaptation and assistance issue in another context.

7. Opportunities in National Adaptation Programmes of Action (NAPAs)

Human mobility – displacement, migration, relocation – induced by, or related to, climate change as an issue of adaptation has found perhaps more significant, detailed and longer-standing expression in various national adaptation programmes of action (NAPAs). It is important to recall here that Article 4.9 of the UNFCCC stipulates

⁸⁶ Ibid.

⁸⁷ Warner, ‘Migration and Displacement’, above n 72, 13.

⁸⁸ Jean-François Durieux ‘Book Review: Climate Change, Forced Migration, and International Law’ (2013) 25 *International Journal of Refugee Law* 187, 189.

that ‘Parties shall take full account of the specific needs and special situations of the Least Developed Countries in their actions with regard to funding and transfer of technology.’ From this basis, the COP decided in 2001 to adopt guidelines that would allow least developed countries (LDCs) to submit national adaptation programmes of action.⁸⁹ The COP argued that ‘the rationale for developing NAPAs rests on the low adaptive capacity of LDCs, which renders them in need of immediate and urgent support to start adapting to current and projected adverse effects of climate change.’⁹⁰ It acknowledged that LDCs may not themselves have the ‘capacity to [...] convey their urgent and immediate needs in respect of their vulnerability and adaptation to the adverse effects of climate change.’⁹¹ According to the UNFCCC:

To address the urgent adaptation needs of the LDCs, a new approach was needed that would focus on enhancing adaptive capacity to climate variability, which itself would help address the adverse effects of climate change. The NAPA takes into account existing coping strategies at the grassroots level, and builds upon that to identify priority activities, rather than focusing on scenario-based modelling to assess future vulnerability and long-term policy at state level. In the NAPA process, prominence is given to community-level input as an important source of information, recognizing that grassroots communities are the main stakeholders.⁹²

In other words, NAPAs would provide a means by which least developed countries, through community consultation, would develop a suit of adaptation activities by which at least their most ‘urgent and immediate needs’ in the climate change context could be addressed, ‘those for which further delay could increase vulnerability or lead to increased costs at a later stage’.⁹³ NAPAs were to contain a variety of

⁸⁹ See United Nations Framework Convention on Climate Change, *Decision 28/CP.7: Guidelines for the Preparation of National Adaptation Programmes of Action*, UN Doc FCCC/CP/2001/13/Add.4 (21 January 2002).

⁹⁰ Ibid, Annex, para 2.

⁹¹ Ibid.

⁹² United Nations Framework Convention on Climate Change, *The National Adaptation Programme of Action (NAPA)* (March 2013) <http://unfccc.int/cooperation_support/least_developed_countries_portal/ldc_work_programme_and_napa/items/4722.php.

⁹³ Ibid.

adaptation activities for each country, ranked by priority from most urgent.⁹⁴ Once a NAPA was finalised, the country concerned was to work with the Global Environment Facility (GEF) and its implementing agencies to develop specific projects for funding under the Least Developed Countries Fund (LDCF), operated by the GEF.⁹⁵ Forty nine NAPAs have been received by the UNFCCC in the last ten years or so, the great majority from Africa, with Somalia and Myanmar being the latest submissions in early 2013.⁹⁶ They include a total number of over 450 projects,⁹⁷ of which over 80 have now moved to approval stage.⁹⁸

Human Mobility in NAPAs

Why are NAPAs important in the context of climate change and displacement? The answer to this question lies in the fact that a significant number of them make at least some mention of displacement, migration or relocation. Some include potential activities that would either foster movement where this is desired or necessary, others seek to prevent it where it is not. In a 2012 study of how migration, displacement, relocation or other mobility issues find mention in forty-five of the submitted NAPAs, Jon Sward and Samuel Codjoe show that ten NAPAs make at least cursory mention of such issues more than twenty times (Solomon Islands tops this list at over 40 mentions); fourteen NAPAs make mention of these issues between ten and nineteen times and twenty-one Programmes mention them nine

⁹⁴ Ibid.

⁹⁵ See, eg, Global Environment Facility, 'Note on GEF Support for National Adaptation Plans of Action' (2002).

⁹⁶ United Nations Framework Convention on Climate Change, *NAPAs Received by Secretariat* (2013) <http://unfccc.int/cooperation_support/least_developed_countries_portal/submitted_napas/items/4585.php>.

⁹⁷ United Nations Framework Convention on Climate Change, *NAPA Priorities Database* (29 March 2012) <http://unfccc.int/cooperation_support/least_developed_countries_portal/napa_priorities_database/items/4583.php>.

⁹⁸ United Nations Framework Convention on Climate Change, *Status of NAPA Implementation under the LDCF* (28 January 2013) <http://unfccc.int/cooperation_support/least_developed_countries_portal/ldcf_napa_projects/items/5632.php>.

times or less (Laos, Nepal and Yemen appear to make the scantest mention – just once).⁹⁹ Overall, several features are to be noted: where mobility is mentioned or engaged with, this is usually in the internal context.¹⁰⁰ Tuvalu's NAPA is a rare exception; it at least mentions briefly a history of Tuvaluans migrating internally as well as externally in the context of overall livelihoods insecurity in the island nation.¹⁰¹ Sward and Codjoe also note that many NAPAs frame people movement as something negative and to be prevented.¹⁰² Perhaps this explains why Susan Martin, who has also surveyed NAPAs, highlights a tendency to propose 'policies and programmes that would have the effect of stabilising populations in areas that might experience large-scale out-migration in the absence of such measures.'¹⁰³ Otherwise, discussion of displacement, migration or relocation varies in the different NAPAs.

The following selection will give a flavour of how they occur:

- Bangladesh's NAPA¹⁰⁴ expects that its project entitled 'Promoting Adaptation to Coastal Crop and Agriculture to Combat Salinization' would halt '[s]ocial consequences of mass scale migration to cities [...] to some extent.' Similarly, through its project entitled 'Adaptation to agriculture Systems in Areas Prone to Enhanced Flash Flooding – North East and Central Region', Bangladesh hopes '[i]n the long-term people might get a means to continue with farming instead of migrating to cities after the flood. This would to some extent reduce social problems of migration of the distressed community to cities.'

⁹⁹ See Jon Sward and Samuel Codjoe, 'Human Mobility and Climate Change Adaptation Policy: A Review of Migration in National Adaptation Programmes of Action (NAPAs)' (Working Paper 6, *Migrating out of Poverty*, University of Sussex, 2012) 15ff. Thirteen countries make no mention of mobility-related issues at all; *ibid.* Jane McAdam also surveyed all NAPAs submitted up to 2012 for mention of human mobility; see McAdam, above n 85, Appendix, 271ff.

¹⁰⁰ Sward and Codjoe, above n 98, 14.

¹⁰¹ Ministry of Natural Resources, Environment, Agriculture and Lands, Government of Tuvalu, *Tuvalu's National Adaptation Programme of Action* (May 2007), 16 <<http://unfccc.int/resource/docs/napa/tuv01.pdf>>

¹⁰² See Sward and Codjoe, above n 99, 14.

¹⁰³ Susan F Martin, 'Climate Change, Migration and Adaptation' (GMF Background Paper on Climate Change and Migration' (The German Marshall Fund of the United States, 2010) 6-7.

¹⁰⁴ Ministry of Environment and Forest Government of the People's Republic of Bangladesh, *National Adaptation Programme of Action (NAPA) – Final Report* (November 2005), 35f <<http://unfccc.int/resource/docs/napa/ban01.pdf>>.

- Bhutan's NAPA¹⁰⁵ notes that several of its projects must also include '[i]dentification of potential areas for resettlement of villages'.
- Guinea-Bissau's NAPA¹⁰⁶ notes how various environmental and climatic factors are 'leading to the displacement of whole villages'.
- Kiribati's NAPA¹⁰⁷ cites instances of past relocation, 'with implications on the uses and sometimes conflicting claims over resettled land'.
- The Maldives' NAPA¹⁰⁸ notes the vulnerability of all of its islands to climate change-associated sea-level rise and has proposed a project in relation to its 'Safer Island Strategy', 'developed by the government to resettle communities from the smaller, more vulnerable islands into larger, better protected ones.'
- Mauritania's NAPA¹⁰⁹ highlights how drought and desertification have led people to partake 'in a massive rural exodus'.
- Samoa's NAPA¹¹⁰ mentions under 'key adaptation needs' '[a]ssistance for relocation of communities inland'.
- Sao Tome and Principe's NAPA¹¹¹ includes a project entitled 'Displacement of Local Communities' for select coastal communities. Proposed activities include construction of new houses elsewhere for such communities, supplying water and energy and relocating populations there.
- Solomon Islands' NAPA¹¹² is concerned about populations on low-lying or artificial islands. It argues that '[f]or most of these communities relocation is a potential adaptation measure. However, relocation is problematic when they do not own land resources on nearby islands thus land tenure and land

¹⁰⁵ National Environment Commission, Royal Government of Bhutan, *Bhutan National Adaptation Programme of Action* (May 2006), eg 30 <<http://unfccc.int/resource/docs/napa/btn01.pdf>>.

¹⁰⁶ Ministry of Natural Resources and Environment, Government of Guinea-Bissau, *National Programme of Action of Adaptation to Climate Change* (December 2006), 15 <http://www.preventionweb.net/files/8525_gnb01.pdf>.

¹⁰⁷ Ministry of Environment, Land and Agricultural Development, Government of Kiribati, Republic of Kiribati, *National Adaptation Program of Action (NAPA)* (January 2007), 11 <<http://unfccc.int/resource/docs/napa/kir01.pdf>>.

¹⁰⁸ Ministry of Environment, Energy and Water, Government, Republic of Maldives, *National Adaptation Program of Action – Republic of Maldives* (2007), 47f <<http://unfccc.int/resource/docs/napa/mdv01.pdf>>.

¹⁰⁹ Ministry of Rural Development and of Environment, Islamic Republic of Mauritania, *National Adaptation Programme of Action to Climate Change* (November 2004), 11 <<http://unfccc.int/resource/docs/napa/mau01.pdf>>.

¹¹⁰ Ministry of Natural Resources, Environment and Meteorology, Government of Samoa, *National Adaptation Programme of Action – Samoa* (December 2005), 17, 18 <<http://unfccc.int/resource/docs/napa/sam01.pdf>>.

¹¹¹ Ministry of Natural Resources and Environment, Government of Sao Tome and Principe, *National Adaptation Programmes of Action on Climate Change* (December 2006), 48 <http://www.preventionweb.net/files/8567_stp01.pdf>.

¹¹² Ministry of Environment, Conservation and Meteorology, Government of Solomon Islands, *Solomon Islands – National Adaptation Programmes of Action* (November 2008), 86 <<http://unfccc.int/resource/docs/napa/slb01.pdf>>.

management systems prohibit any discussion let alone relocate to nearby islands. For example, Langalanga people cannot move to nearby island where they do not own land and its resources.’ It notes that ‘it will require legislative and structural changes to the land tenure and land management systems in the country to facilitate [relocation and resettlement].’¹¹³ It fears that ‘[t]he biggest risk is that land owners and resource owners may not agree to the terms and conditions of relocation and also may claim compensation to the amounts that could be prohibitive for the government. It is therefore imperative to engage the relocating people and the resource owners at the very early stage of planning.’¹¹⁴

- Sudan’s NAPA notes how ‘past climatic shocks such as drought [have led to] large-scale human suffering from hunger among [affected] groups, including forced out migration from rural areas’.¹¹⁵
- Tanzania’s NAPA¹¹⁶ counts amongst its ‘selected projects activities’ the ‘relocation of vulnerable communities from low-lying areas’.
- Tuvalu’s NAPA¹¹⁷ raises concerns that ‘increasing population and internal migration to urban areas and the increasing changes in climate and variability resulting in erratic rainfall pattern changes [are causing] water problem[s] in Tuvalu’.
- Uganda’s NAPA¹¹⁸ engages with migration in lengthier fashion: ‘If affected communities have no option for coping with climate-induced stress, especially in drought-prone areas then, victims migrate to urban areas or resource-endowed neighbourhoods. In the lakeside communities e.g. Nakasongola, migration includes settling on suds (floating islands). This strategy causes social and economic conflicts, which may lead to instability, family disintegration and related conflicts. The movement of livestock and wildlife often ensures their survival. However, it is one of the biggest modes of disease spread. Migrating animals also suffer physical injuries and death. In the protected areas such as the national parks and game reserves, these negative aspects of the strategy are more pronounced. In the pastoral communities where livestock is the major source of food, migration of the men (family leaders) with the livestock herds in search of water and pasture often leaves the family behind more vulnerable to famine.’ Uganda also mentions relocation of communities ‘to safer areas/districts’ in relation to one of its project.¹¹⁹

¹¹³ Ibid, 42.

¹¹⁴ Ibid, 87.

¹¹⁵ Ministry of Environment and Physical Development, Republic of Sudan, *National Adaptation Programme of Action* (July 2007), 9 <<http://unfccc.int/resource/docs/napa/sdn01.pdf>>

¹¹⁶ Vice President’s Office, Government of the United Republic of Tanzania, *United Republic of Tanzania – National Adaptation Programme of Action* (NAPA) (January 2007), ix <<http://unfccc.int/resource/docs/napa/tza01.pdf>>.

¹¹⁷ Ministry of Natural Resources, Environment, Agriculture and Lands, Government of Tuvalu, above n 101, 45.

¹¹⁸ The Republic of Uganda, *Uganda National Adaptation Programmes of Action* (2007), 44 <<http://unfccc.int/resource/docs/napa/uga01.pdf>>.

¹¹⁹ Ibid, 56.

Different themes emerge: Several NAPAs acknowledge that migration or displacement have historically occurred in relation to environmental factors but suspect that climate change may add to pre-existing pressures¹²⁰ which may compel people movement further. As has been noted before, people movement is considered undesirable in many NAPAs: it can cause social conflict¹²¹ or instability,¹²² economic hardship,¹²³ land disputes,¹²⁴ resource pressures¹²⁵ and disease, for example when livestock move with people.¹²⁶ Rural to urban migration, in particular, is something that many NAPAs want to prevent.¹²⁷ On the other hand, many NAPAs do acknowledge that some people movement is likely and necessary. However, such NAPAs envision that movement is facilitated by the state through planned and orderly relocation.¹²⁸ One final caveat to note is that although this chapter is no longer concerned with the idea of compensation, it is Gambia's NAPA¹²⁹ which, in a project entitled 'Restoration/Protection of Coastal Environments', explicitly envisions not only resettlement in relation to the project but also that 'compensation

¹²⁰ See, eg, Ministry of Environment and Forest Government of the People's Republic of Bangladesh, above n 104, 35.

¹²¹ Eg, *ibid* and The Republic of Uganda, above n 118.

¹²² Eg, The Republic of Uganda, above n 118.

¹²³ Eg, *ibid*.

¹²⁴ Eg, Ministry of Environment, Land and Agricultural Development, Government of Kiribati, Republic of Kiribati, above n 107 and Ministry of Environment, Conservation and Meteorology, Government of Solomon Islands, above n 112.

¹²⁵ Eg, Ministry of Natural Resources, Environment, Agriculture and Lands, Government of Tuvalu, above n 101.

¹²⁶ Eg, The Republic of Uganda, above n 118.

¹²⁷ Eg, Ministry of Environment and Forest Government of the People's Republic of Bangladesh, above n 104 and Ministry of Natural Resources, Environment, Agriculture and Lands, Government of Tuvalu, above n 101.

¹²⁸ Eg, Ministry of Natural Resources, Environment and Meteorology, Government of Samoa, above n 110, Vice President's Office, Government of the United Republic of Tanzania, above n 116 and Ministry of Environment, Energy and Water, Republic of Maldives, above n 108; also Martin, above n 103, 3.

¹²⁹ Department of State for Forestry and Environment, Government of Gambia, *Gambia National Adaptation Programme of Action (NAPA) on Climate Change* (November 2007), 82 <<http://unfccc.int/resource/docs/napa/gmb01.pdf>>.

will have to be considered'. That said, Sao Tome and Principe's NAPA also makes a veiled reference to compensation in connection with relocation.¹³⁰

Project Implementation

According to the UNFCCC website, over eighty projects contained in NAPAs have now advanced to approval and implementation stage.¹³¹ More than half (56.1 percent) of the approved funds have been dedicated to projects in Africa (the majority of NAPAs originate from that continent), nearly a quarter to projects in Small Island Developing States (SIDS) (24.5 percent) and nearly a fifth to projects in Asia (19.1 percent), with the remaining funding going to other regions.¹³² Several of the projects underway deal with issues that are, at least inadvertently, connected to displacement, migration or relocation: Tuvalu, for example, which views migration and resettlement as a 'last resort to adaptation ... should the wors[t] case scenario occur',¹³³ has seen its 'Increasing Resilience of Coastal Areas and Community Settlement to Climate Change' project endorsed, implementation costs of which are USD 8.2 million (not all the funds come from the LDCF).¹³⁴ Amongst other things, the project's goal, according to Tuvalu's NAPA, is to enhance the protection of coastal communities from erosion, tidal surges and other phenomena through 'the construction of coastal defences and the planting of green belts along the coastline',¹³⁵ thereby enabling continued habitation of such communities. Other

¹³⁰ Ministry of Natural Resources and Environment, Government of Sao Tome and Principe, above n 111, 48.

¹³¹ See United Nations Framework Convention on Climate Change, above n 98.

¹³² Global Environment Facility, *Least Developed Country Fund* (2013) <<http://www.thegef.org/gef/LDCF>.

¹³³ Ministry of Natural Resources, Environment, Agriculture and Lands, Government of Tuvalu, above n 101, 25.

¹³⁴ See United Nations Framework Convention on Climate Change, above n 98.

¹³⁵ Ministry of Natural Resources, Environment, Agriculture and Lands, Government of Tuvalu, above n 101, 41.

projects approved also deal with human habitation, livelihoods and the possibility of dislocation. These include Nepal's 'Community-based Flood and Glacial Lake Outburst Risk Reduction' project (USD 25 million total cost)¹³⁶ and the aforementioned Maldives' project on 'Integration of Climate Change Risks into the Maldives Safer Island Development Programme' (USD 9.9 million total cost).¹³⁷ Evaluating the success and impact of such projects, however, is difficult for the time being, as none are completed.

Final Words

NAPAs are an important tool by which at least LDCs have been able to raise climate change-induced or related human mobility as an adaptation concern. This is important because NAPAs have permitted that such concerns are not only voiced but addressed on a project basis. Several NAPAs include projects whereby mobility is either fostered (i.e. through relocation) or where it is prevented where so desired (i.e. through addressing climate change-related community vulnerabilities). Importantly for distributive justice, least developed countries are able to seek funding for such projects from a special fund set up exclusively to address their particular vulnerabilities and funded by those who contribute to climate change and its effects.

Nevertheless, NAPAs are project-oriented and can address vulnerabilities only in piece-meal fashion. The 2007/2008 Human Development Report highlighted this problem:

First, they provide a very limited response to adaptation challenges, focusing primarily on 'climate proofing' through small-scale projects. ... Second, the NAPAs have, in most countries, been developed outside of the institutional framework for national planning on poverty reduction. The upshot is a project-based response that

¹³⁶ See United Nations Framework Convention on Climate Change, above n 98.

¹³⁷ Ibid.

fails to integrate adaptation planning into the development of wider policies for overcoming vulnerability and marginalization.¹³⁸

Others have questioned whether the community involvement envisioned by NAPAs was sufficiently addressed: Saleemul Huq and Mizan Khan for example argue that

if procedural justice, meaning fairness of the process used to prioritize the activities, can be ensured in the NAPA process, considerations of equity in outcome can be addressed. This requires a bottom-up approach to each step of the NAPA, so that the immediate needs and concerns of the most affected communities are included in the list of projects for funding under NAPAs.¹³⁹

They show how, certainly in relation to Bangladesh's NAPA, this was not always done.¹⁴⁰

Ultimately, NAPAs represent a valuable but not a comprehensive approach by which climate change-induced or related mobility may be tackled. Martin argues that they do not present a 'coherent framework'.¹⁴¹ Huq and Khan critique their sector-based, non-holistic approach.¹⁴² Importantly, the great majority of projects proposed in NAPAs have remained un-approved or un-funded and future funding is far from certain (the following section will outline this in greater detail). A vast discrepancy has emerged, in other words, between the priorities identified in NAPAs and the availability of funds to support them. From a distributive justice angle, NAPAs have therefore remained an elusive success story, despite the fact that they explicitly target those who, certainly in the Senian (and Nussbaum), capability-centred view of distributive justice, have been acknowledged to be *most* in need of assistance on account of particular, pre-existing vulnerabilities. The final section of this chapter

¹³⁸ Cited in Susan F Martin, 'Climate Change, Migration and Governance' (2010) 16 *Global Governance* 397, 401.

¹³⁹ Saleemul Huq and Mizan R Khan, 'Equity in National Adaptation Programs of Action (NAPAs: The Case of Bangladesh' in W Neil Adger, Jouni Paavola, Saleemul Huq and M J Mace (eds), *Fairness in Adaptation to Climate Change* (MIT Press, 2006) 181, 181f.

¹⁴⁰ Ibid.

¹⁴¹ Martin, above n 103, 7.

¹⁴² Huq and Khan, above n 139, eg 196.

will discuss in further detail adaptation financing issues, including the financing of NAPAs, and critique this from a distributive justice and a displacement angle.

8. Climate Change Adaptation Funding and Distributive Justice

The chapter has covered much ground: it has argued that climate change burdens (and benefits) will be distributed unevenly. This is as true for the burdens which will arise in relation to displacement, as it is for many other detrimental climate change effects. Distributive justice demands that something is done to re-balance this inequity and the chapter has shown that the international regime tasked with addressing climate change is underpinned by this notion. Within the regime, human mobility-related matters such as displacement have begun to be identified as a particular issue that may be eligible for, and require, adaptation assistance. At least in theory, then, the issue is well situated to find at least some resolve through the commitments made by those thought to largely have caused climate change. However, in practice distributive resolution of climate change burdens such as displacement of course depends not only on theoretical commitments made but their matching with the actual transfer of assistance, for the most part monetary funding. The final section of this chapter will reveal a narrative of mixed successes and uncertain prospects with regards to this aspect of distribution.

Emergence of the Adaptation Funding Architecture

Responsibilities for funding adaptation measures and eligibility to receive funding for such measures, is differentiated.¹⁴³ Article 4.3 of the UNFCCC provides that developed country parties (Annex II) shall ‘provide such financial resources, including through the transfer of technology, needed by developing country Parties to meet the agreed full incremental costs of implementing measures covered by paragraph 1 of this Article’. Paragraph 1 lists a host of measures, including the promotion of sustainable development (d) and cooperation in the preparation for adaptation (e). Article 4.3 also stipulates that financial resources provided to developing countries must be ‘new and additional’. Article 4.4 further stipulates that ‘developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.’ Article 4.9 notes that with regards to funding and other measures particular attention must be paid to ‘the specific needs and special situation of the least developed countries’. Article 4.7 highlights that implementation of developing country commitments under the UNFCCC ‘will *depend on* the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology’. Article 11 establishes the overall financial mechanism of the UNFCCC: ‘A mechanism for the provision of financial resources [...] is hereby defined.’ As an interim arrangement, Article 21(3) nominated the Global Environment Facility as ‘the international entity entrusted with the operation of the financial mechanism referred to in Article 11’,

¹⁴³ M J Mace, ‘Adaptation under the UN Framework Convention on Climate Change: The International Legal Framework’ in W Neil Adger et al, above n 139, 53, 53f; see also the prior discussion in this chapter.

although the financing of adaptation activities, as the following pages will show, has become more intricate and dispersed since.

At its first session in 1995, the COP decided that

[a]daptation to the adverse effects of climate change, as defined by the Convention, will require short, medium and long term strategies which should be cost effective, take into account important socio-economic implications, and should be implemented on a stage-by-stage basis in developing countries that are Parties to the Convention..¹⁴⁴

The COP envisioned three stages: Stage I was to be about planning for adaptation and should start immediately. Stages II and III were envisioned as medium- to long-term measures, and were to include capacity-building and eventually the implementation of adaptation measures, including insurance.¹⁴⁵ Various schemes have emerged since to operationalize this, and Stages II and III are well underway.¹⁴⁶

The Least Developed Countries Fund for the establishment and implementation of NAPAs has already been mentioned. It was set up in 2002 and supports the preparation of NAPAs and the implementation of specific projects enclosed therein. It is operated by the Global Environment Facility and its implementing agencies: the Asian Development Bank, the African Development Bank, the European Bank for Reconstruction and Development, the Food and Agriculture Organization, the Inter-American Development Bank, the International Fund for Agricultural Development, the United Nations Development Programme, the United Nations Environment Programme, the United Nations Industrial Development Organization and the World Bank. The Special Climate Change Fund (SCCF), also established in 2002 and run under the auspices of the GEF, was set up to climate-proof national development

¹⁴⁴ United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its First Session, Held at Berlin from 28 March to 7 April 1995 – Part Two: Action Taken by the Conference of the Parties at its First Session*, UN Doc FCCC/CP/1995/Add.1 (6 June 1995) 36.

¹⁴⁵ Ibid, 37.

¹⁴⁶ For a full list see Climate Funds Update, *Climate Fund Profiles* (2013) <<http://www.climatefundsupdate.org/listing>>. The following outline of various adaptation funds is based on this.

sectors. The Strategic Priority on Adaptation (SPA) was established in 2003 and for three years enabled the GEF to test how full-fledged adaptation projects could best be developed. The Adaptation Fund (AF), established under the Kyoto Protocol¹⁴⁷ and operational only for a few years, provides adaptation funding for projects in developing countries. It is funded in part through earnings from the clean development mechanism (CDM), as well developed country contributions, like the other two funds. Two further mechanisms have global reach: first, the World Bank operates a Pilot Program for Climate Resilience, administered under its Climate Investment Funds and set up to improve climate resilience in vulnerable countries.¹⁴⁸ Secondly, the European Union's Global Climate Change Alliance (GCCA) initiative is conceptualised as a 'platform for dialogue and exchange as well as practical cooperation' but is also 'backed by strong commitment from the EU to increase financial support for adaptation measures in LDCs and SIDS'.¹⁴⁹ The EU's initiative does not set up a new funding mechanism. Controversially, the World Bank's scheme is funded in the form of grants or 'highly concessional financing' that has to be paid back.¹⁵⁰

A complex system has evolved, which 'raises many governance questions', including about 'fragmentation, inconsistencies and duplication'.¹⁵¹ Tom Mitchell et al note several concerns which have been raised in particular by developing countries: 'governance structures are seen by developing countries as complex and

¹⁴⁷ Under art 12.8.

¹⁴⁸ See, eg, Climate Investment Funds, *Pilot Program for Climate Resilience* (2013) <<https://www.climateinvestmentfunds.org/cif/node/4>>.

¹⁴⁹ See Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament: Building a Global Climate Change Alliance between the European Union and Poor Developing Countries Most Vulnerable to Climate Change*, COM(2007) 540final, 18 September 2007, 2f.

¹⁵⁰ See Climate Investment Funds, above n 148, 2.

¹⁵¹ See, eg, Åsa Persson, 'Institutionalising Climate Adaptation Financing Under the UNFCCC and Beyond: Could an Adaptation "Market" Emerge?' (Working Paper No 2011-03, Stockholm Environment Institute, 2011) 5.

weighted in favour of donor countries' and 'rules and structures make accessing funding difficult and time-consuming'. Finally, there is thought to be a 'lack of transparency in decision making' processes, with not enough consideration given to poorer country perspectives.¹⁵² Some have been concerned that although most adaptation finance schemes are set up to serve developing and particularly vulnerable countries, actual projects have sometimes been funded in countries that cannot be said to fall in this category.¹⁵³ For these and other reasons a new mechanism has been initiated, into which the other funds may eventually be merged¹⁵⁴ and, it is hoped, which would simplify procedures.¹⁵⁵

The Green Climate Fund

The latest mechanism to join international climate change finance, including the financing of adaptation, is the Green Climate Fund (GCF), agreed upon by UNFCCC states parties at COP17 in Durban in 2011. The GCF is 'to support projects, programmes, policies and other activities in developing country Parties'.¹⁵⁶ It is not entirely clear where funding for the GCF would come from: the COP16 outcome text in 2010 'took note' of 'relevant reports on the financing needs and options for

¹⁵² Tom Mitchell, Simon Anderson and Saleemul Huq, 'Principles for Delivering Adaptation Finance' (Briefing, Institute of Development Studies, University of Sussex, 2008) 2.

¹⁵³ Annett Möhner and Richard J T Klein, 'The Global Environment Facility: Funding for Adaptation or Adapting to Funds?' (Working Paper, Climate and Energy Programme, Stockholm Environment Institute, 2007) 13. The authors cite a project in Hungary as an example.

¹⁵⁴ Although it has been stated that the Fund would 'operate in the context of appropriate arrangements between itself and other existing funds under the Convention, and between itself and other funds, entities, and channels of climate change financing outside the Fund.'; see United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Seventeenth Session, Held in Durban from 28 November to 11 December 2011 – Part Two: Action Taken by the Conference of the Parties at its Seventeenth Session*, UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012) Annex, para 33.

¹⁵⁵ Richard K Lattanzio, 'International Climate Change Financing: The Green Climate Fund' (Congressional Research Service, United States Government, 2013) 1, 9.

¹⁵⁶ United Nations Framework Convention on Climate Change, above n 154, para 3. Note that this is to cover both mitigation and adaptation related activities; see United Nations Framework Convention on Climate Change, above n 154, Annex, para 2.

mobilization of resources to address the needs of developing countries Parties with regard to climate change adaptation and mitigation.’¹⁵⁷ The Durban text stipulated somewhat more specifically that the Fund ‘would receive financial inputs from developed country Parties to the Convention’ and that it ‘may also receive financial inputs from a variety of other sources, public and private, including alternative sources.’¹⁵⁸ In the meantime, Korea has agreed to be host to the Fund and operation is expected to begin in 2014. Yet, many challenges remain. Richard Lattanzio notes that there are uncertainties especially about the fit of the Fund with other climate finance mechanisms, as well as about how to operationalize both the sourcing and disbursement of funding.¹⁵⁹ Transparency and participatory issues have also been noted, with meeting minutes not necessarily published and observer participation restricted.¹⁶⁰ This has raised concerns especially because developed and developing country states parties cannot agree on the future direction of the Fund, with the former envisioning a scheme largely detached from the UNFCCC and supported by the private sector, and the latter insisting on UNFCCC primary involvement and the responsibility of certain *states* to fund the GFC (the distributive justice option).¹⁶¹ However, these are not the only issues plaguing the Fund. Even where it was to be successful in being set up as a largely distributive body under the umbrella of the UNFCCC, what plagues the whole adaptation architecture, including the GCF as it is now being set up, is a significant disjuncture between identified adaptation needs and

¹⁵⁷ United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 – Part Two: Action Taken by the Conference of the Parties at its Sixteenth Session*, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 95.

¹⁵⁸ United Nations Framework Convention on Climate Change, above n 154, Annex, para 29 and para 30.

¹⁵⁹ Lattanzio, above n 155, 2.

¹⁶⁰ Alex Lenferna, *COP18: Negotiating the Green Climate Fund or the Green Corporate Fund* (19 November 2012) <<http://thinkafricapress.com/environment/global-climate-financing-losing-its-way-cop18-gcf>.

¹⁶¹ *Ibid.*

the funding inputs provided by those responsible for creating those needs in the first place. Thus, the Green Climate Fund, for example, expected to become operational shortly, has been the subject of pledges totalling only USD 6 million, with approximately USD 3 million deposited.¹⁶² Adaptation funding issues and their relationship to distributive justice and to climate change and displacement will be discussed in the following sub-section.

Adaptation Costs, Pledges and Contributions

Many estimates of the costs of climate change adaptation have been put forward. The *Stern Review of Economics of Climate Change*, relying on World Bank estimates, noted that soon ‘additional costs of adaptation alone [will be] \$4-37 billion each year.’¹⁶³ Oxfam has ‘estimate[d] that adaptation will cost at least \$50bn each year, and far more if global emissions are not cut rapidly.’¹⁶⁴ Some of these estimates have been criticised for not being ‘substantive’ or methodologically sound,¹⁶⁵ and for likely being based on ‘substantial under-estimates’.¹⁶⁶ More recently, studies have presented larger estimates of global adaptation costs. In 2010, the World Bank, for example, ‘estimate[d] that the price tag between 2010 and 2050 for adapting to an approximately 2 degrees warmer world by 2050 will be in the range of \$70 to \$100 billion a year.’¹⁶⁷ The International Climate Action Network has suggested developed countries need to provide [...] at least US\$100 billion per

¹⁶² Climate Funds Updates, *Green Climate Fund* (2013) <<http://www.climatefundsupdate.org/listing/green-climate-fund>>.

¹⁶³ Nicholas Stern, *The Stern Review of Economics of Climate Change* (Cambridge University Press, 2006) 502.

¹⁶⁴ Oxfam, ‘Adapting to Climate Change: What is the Need in Poor Countries and Who Should Pay?’ (Oxfam Briefing Paper 104, 2007) 1.

¹⁶⁵ Martin Parry et al, ‘Assessing the Costs of Adaptation to Climate Change: A Review of the UNFCCC and Other Recent Estimates’ (Grantham Institute of Climate Change, Imperial College, 2009) 8.

¹⁶⁶ Ibid, 7.

¹⁶⁷ The World Bank, ‘Economics of Adaptation to Climate Change: Global Cost Estimate’ (2010) xvi.

year in grants for adaptation in developing countries' alone.¹⁶⁸ Although such figures remain contested,¹⁶⁹ it is beyond doubt that climate change adaptation involves significant costs and that developing countries, in particular, cannot meet these themselves.¹⁷⁰ Nor should they: as a matter of distributive justice such costs should be the responsibility of those who have contributed to making their expenditure necessary in the first place (and who have benefitted). Evidence of whether such responsibilities are being taken seriously will now be presented.

Comparing the staggering adaptation cost figures just cited to the inputs received by each adaptation fund reveals a significant gap between demand and actual contributions to adaptation needs on the ground. The aforementioned NAPAs, concerning only the most urgent and immediate adaptation needs of least developed countries (including those related to human mobility), include a total of over 450 projects. In 2009, the Least Developed Countries Expert Group noted that the 42 NAPAs submitted by then (there are 49 now) included 433 projects at a total cost of 'at least USD 2 billion',¹⁷¹ and an average requested expenditure of USD 40 million per country.¹⁷² As of April 2013, however, a total of only USD 600 million had been pledged to the Least Developed Countries Fund, most of which has been deposited¹⁷³ and allocated to projects.¹⁷⁴ This represents less than thirty percent of

¹⁶⁸ Climate Action Network International, 'Fair, Ambitious and Binding: Essential for a Successful Climate Deal' (2009) 4.

¹⁶⁹ See, eg, Smita Nakhooda, Alice Caravani, Neil Bird and Liane Schalatek, 'Climate Finance Fundamentals' (Brief 3, Heinrich Böll Stiftung [Foundation] North America, 2011) 2.

¹⁷⁰ Ibid.

¹⁷¹ United Nations Framework Convention on Climate Change, Least Developed Countries Expert Group, 'Support Needed to Fully Implement Adaptation Programmes of Action (NAPAs)' (2009) 17.

¹⁷² Ibid, 7.

¹⁷³ Climate Funds Update, *Least Developed Countries Fund* (2013) <<http://www.climatefundsupdate.org/listing/least-developed-countries-fund>>.

¹⁷⁴ Global Environment Facility, LDCF/SCCF Council, *Progress Report on the Least Developed Countries Fund and the Special Climate Change Fund* (20 June 2013), iii <http://www.thegef.org/gef/sites/thegef.org/files/documents/GEF-LDCF.SCCF_14-03.%20Progress%20Report%20on%20the%20Least%20Developed%20Countries%20Fund%20and%20Special%20Climate%20Change%20Fund,%202013-05-23_1.pdf>.

the figure noted by the Least Developed Countries Expert Group as necessary to cover all projects. Worse, project implementation has turned out to be more costly than anticipated by many least developed countries. Tuvalu's NAPA, for example, offers a budget breakdown of its aforementioned 'Increasing Resilience of Coastal Areas and Community Settlement to Climate Change' project, which it anticipated would cost USD 1.9 million to implement.¹⁷⁵ However, total project costs are currently listed as USD 8.2 million on the UNFCCC's website,¹⁷⁶ so four times more than originally expected.

The Global Environment Facility has also acknowledged that demand exceeds significantly supply into its Special Climate Change Fund.¹⁷⁷ A total of over USD 259 million had been pledged by donors for its Phase 5 (2010 – 2014) by April 2013, of which USD 240 million have been deposited¹⁷⁸ and 220 million spent on 53 projects (an average of USD 4 million per project).¹⁷⁹ The Adaptation Fund, finally, though funded automatically through the Clean Development Mechanism, is supplemented by developed country contributions: by April 2013, USD 166 million had been pledged for this Fund, most of which had been deposited.¹⁸⁰

The sum of all inputs to the adaptation funds just discussed total about USD 1 billion. Even though the CDM would have generated additional adaptation funding and financial inputs have also been made into the other adaptation funds or mechanisms mentioned (the EU's and the World Bank's), this is nowhere near the

¹⁷⁵ Ministry of Natural Resources, Environment, Agriculture and Lands, Government of Tuvalu, above n 101, 42.

¹⁷⁶ See United Nations Framework Convention on Climate Change, above n 98.

¹⁷⁷ Global Environment Facility, LDCF/SCCF Council, *Progress Report on the Least Developed Countries Fund (LDCF) and Special Climate Change Fund (SCCF)* (28 October 2011), 11 <http://www.thegef.org/gef/sites/thegef.org/files/documents/Progress%20Report%20on%20LDCF%20SCCF%20formatted%20final_Oct27_2011.pdf>.

¹⁷⁸ Climate Funds Update, *Special Climate Change Fund* (2013) <<http://www.climatefundsupdate.org/listing/special-climate-change-fund>>.

¹⁷⁹ Global Environment Facility, LDCF/SCCF Council, above n 174, iii.

¹⁸⁰ Climate Funds Update, *Adaptation Fund* (2013) <<http://www.climatefundsupdate.org/listing/adaptation-fund>>.

adaptation cost figures mentioned in the studies and reports noted earlier (up to USD 100 billion per year for developing countries alone). In the context of such shortfalls, financial commitments made to both adaptation and mitigation financing at COP16 in Cancun seem more promising: ‘new and additional resources [...] approaching USD 30 billion for the period 2010-2012’ were to be made available for both adaptation and mitigation activities.¹⁸¹ Furthermore, developed country parties were to ‘commit [...] to a goal of mobilizing jointly USD 100 billion per year by 2020 to address the needs of developing countries.’¹⁸² The latter is an astonishing figure. The mobilisation of the ‘fast-start’ pledge to 2012 might give an idea as to developed country commitment to achieving the targets set at Cancun: pledges that soon emerged totalled USD 34 billion, seemingly surpassing the Cancun goal.¹⁸³ However, the World Resources Institute notes several issues: First, mitigation and adaptation are not equally addressed; for example, Germany’s ‘fast-start’ pledge dedicated almost twice as much funding to mitigation as adaptation.¹⁸⁴ Secondly, there are concerns that not all pledges fulfil the ‘new and additional’ requirement of ‘fast-start’ funding and that some countries simply ‘re-packaged’ prior commitments.¹⁸⁵ Lisa Junghans and Sven Harmeling, in a study of the OECD ‘Adaptation Marker’, note that ‘far less projects than the donor countries reported are in fact relevant to what can be considered climate change adaptation.’¹⁸⁶ In the meantime, no further agreement on how to reach USD 100 billion for adaptation assistance to developing countries by 2020 has been reached.

¹⁸¹ United Nations Framework Convention on Climate Change, above n 157, para 95.

¹⁸² Ibid, para 98.

¹⁸³ World Resources Institute, *Summary of Developed Country ‘Fast-Start’ Climate Finance Pledges* (November 2012) <<http://www.wri.org/publication/summary-of-developed-country-fast-start-climate-finance-pledges#qanda>>.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Lisa Junghans and Sven Harmeling, ‘Different Tales from Different Countries: A First Assessment of the OECD “Adaptation Marker”’ (Germanwatch, 2012) 4.

What Does This Mean for Distributive Justice and for Displacement?

What does all this mean for distributive justice? On a structural level, the international regime for adaptation assistance is based on notions of distributive justice (despite some efforts to remove it from this realm, for example, in relation to the GCF), with important instruments and documents leaving little doubt that wealthier, high-emitting countries are responsible for assisting with adaptation needs generated in vulnerable places elsewhere. However, concretely this raises few obligations and international financing of adaptation has remained underfunded. For displacement this has two consequences: First, the one mechanism through which mobility-related issues, including displacement, can expressly be addressed in the international climate change regime, NAPAs, has been the subject of limited contributions, casting doubt on such issues finding significant resolve through this channel. Secondly, because it is the implementation of adaptation measures as a whole which may contribute to the prevention of displacement, an international adaptation funding architecture significantly lacking in financial inputs prevents adaptation playing this role in significant ways.

9. Conclusion

The chapter analysed whether displacement in the climate change context could be considered a disproportionate burden, one which should or could find relief through the application of international assistance norms grounded in distributive justice. Unlike earlier chapters, which focused on the notion of responsibility for *compensation*, the current chapter focused on the notion of responsibility in

particular for financial *assistance* – assistance from those arguably responsible for climate change and its ill effects to those with little responsibility, from those with the means to assist to those without, from those who have benefitted from processes that contribute to climate change to those who have not.

The chapter, first, set up climate change and displacement as an issue of distributive (in)justice. It argued that, like other climate change burdens, the displacement burden will be distributed unevenly, in the spatial and moral sense. The chapter then investigated how distributive justice features in international law, showing that it underpins several of international law's regimes, albeit not usually in ways that are enforceable. The chapter then turned to a more detailed analysis of the distributive justice underpinnings of the international climate change regime. The chapter noted that the regime has strong distributive justice foundations, making high-emitting countries responsible for distributing resources to poorer (usually low-emitting countries) in order for the latter to be able to implement climate change adaptation measures. The chapter also briefly related this responsibility regime back to various justice theories explored in Chapter Four.

The chapter argued that the distributive justice aspirations of the international climate change regime, in particular in relation to adaptation, provide an important background by which to consider assistance through (re)-distribution in relation to climate change-induced or related people movement. Because such movement can be conceptualised as an adaptive response to changing circumstances (as well as to persistent inequalities), including climatic conditions, adaptation assistance could and should logically be channelled towards supporting it, and towards diminishing the negative consequences that may arise from movement. Equally, adaptation

assistance may well prevent movement where this is desired, where adaptation assistance is channelled towards decreasing vulnerabilities.

The chapter showed that, in fact, issues of human mobility have already emerged within the international adaptation assistance regime, both in the general adaptation framework and the one concerning least developed countries in particular. Although mention of migration, displacement and relocation in the general framework does not yet permit the distribution of assistance to those directly affected (those most in need), their inclusion in a document committing developed nations to adaptation assistance is nevertheless important. The regime for adaptation assistance for least developed countries has permitted more explicit mention of concerns about human mobility resulting from changing climatic conditions; several national adaptation programmes of action submitted by least developed countries include projects concerning prevention, as well as the facilitation of movement where necessary. Some projects including aspects related to migration, displacement or relocation have now secured funding.

A more detailed discussion of adaptation funding comprised the final section of this chapter, which argued that theoretical commitments to distributive justice in the international climate change regime are ill-matched by its implementation in practice. Although fundamental commitments to adaptation assistance (and thereby to distributive justice) have been made by developing countries, the regime does not insist that such commitments must be complied with in practice. Could this be, as Shue has argued, because '[i]f one is profiting from injustice, it is hardly going to be in one's interest to pursue justice.'¹⁸⁷

¹⁸⁷ Henry Shue, 'The Unavoidability of Justice' in A Hurrell and B Kingsbury (eds), *The International Politics of the Environment: Actors, Interests, and Institutions* (Oxford University Press, 1992) 373, 376.

Ultimately, this has implications also for displacement in the climate change context: specifically, with adaptation funds seeing no more than a trickle of what has been promised or what is needed, adaptation projects that expressly target issues of mobility (e.g., in NAPAs) will remain unfunded. More generally, because the extent of adaptation activities implemented may impact on the extent of climate change-induced displacement, underfunding adaptation as a whole may influence the extent of people movement. Resolving the displacement dilemma in distributive fashion through adaptation funding assistance therefore remains somewhat doubtful.

Whereas this chapter has sought to dissect opportunities for distributive justice in the climate change displacement context through financial alleviation of the burden of movement where it happens, or its prevention where this is sought, in other words in the climate change adaptation context, the following chapter will seek to discuss distributive issues concerning the burden of displacement if viewed from the perspective of the concept of international burden-sharing. It will therefore shift the analysis to distributional issues concerning more expressly those who may have to shelter displacees.

CHAPTER 8

Distributive Justice: Burden-Sharing

Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice.¹

(United Nations Millennium Declaration, 2010)

1. Introduction

The previous chapter focused on opportunities for distributive justice in relation to displacement in the climate change context through financial assistance, particularly in the adaptation context. This concerned, largely, the channelling of the financial resources required to meet the burdens associated with movement, but also its prevention, from those who have contributed overwhelmingly to climate change and its ill-effects to those who have contributed little and who without such assistance have limited opportunities to counter the detrimental impacts of climate change, including those arising in relation to displacement (the least well-off). In other words, the chapter concerned the burdens, and their alleviation, of individuals, communities and states faced with the possibility of displacement. The current chapter will again rely on distributive justice notions, this time to explore opportunities to distribute the burden that, arguably, are displacees – that is, in the context where prevention of displacement has failed – through mechanisms revolving around the construct of international burden-sharing. As a concept, international burden-sharing has its roots in the development of contribution models for NATO members in the 1950s, though it has emerged more notably in relation to

¹ United Nations General Assembly, *United Nations Millennium Declaration* (2000), para 6 <<http://www.un.org/millennium/declaration/ares552e.htm>>.

both regional and global responsibilities (held by states) concerning displaced persons.² It frequently arises in discussion, both theoretical and applied, about alleged inequalities in the distribution of duties of reception, processing, care and integration of displaced persons, in particular refugees, in hosting states.³ The Preamble of the 1951 Refugee Convention mentions explicitly the possibility of ‘international cooperation’ in sharing the ‘burdens’ created by refugee arrivals,⁴ though agreement about what burden-sharing precisely is, or how it could be achieved, enforced or operationalised, has been difficult to attain.⁵ Gregor Noll argues that, in fact, the concept is ‘[a]ttractively void of precise meaning’⁶ and problematic in that ‘[i]t appears to suggest that [...] protection is necessarily burdensome.’⁷

Nevertheless, limited burden-sharing has been engaged in (and certainly called for) in the displacement context in the last several decades. Investigating the extent of such sharing, its motivations and impact may therefore be useful when contemplating the possibility of inter-state sharing responsibilities in the climate change displacement context and therefore distributive justice amongst states concerning the sheltering ‘burden’. The chapter will, firstly, seek to outline the relationship between burden-sharing and distributive justice, arguing that though certainly (re)distributive, sharing in the inter-state context is motivated by complex normative considerations, which differ from what may motivate distribution in the adaptation context. The chapter will then place the notion of burden-sharing within a

² See Eiko Thielemann, ‘Editorial’ (2003) 16 *Journal of Refugee Studies* 225, 225.

³ See Matrix Insight, Eiko Thielemann, Richard Williams and Christina Boswell, ‘What System of Burden-Sharing Between Member States for the Reception of Asylum Seekers?’ (Committee on Civil Liberties, Justice and Home Affairs, European Parliament, 2010) 26.

⁴ It does not establish binding legal obligations.

⁵ See Benjamin Cook, ‘Method in its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and a Proposed Refugee Market’ (2004-2005) 19 *Georgetown Immigration Law Journal* 333, 334f.

⁶ Gregor Noll, ‘Risky Games? A Theoretical Approach to Burden-Sharing in the Asylum Field’ (2003) 16 *Journal of Refugee Studies* 236.

⁷ *Ibid*, 237.

wider context of commitments to cooperation and solidarity under international law, highlighting in particular the legal character and validity of such principles. The chapter then moves on to outline more explicitly how burden-sharing features in relation to displacement, showing both how it is enshrined in the regimes concerning displaced persons (largely refugees) and how it has featured in a series of actual displacement scenarios (largely mass influx). Another section will consider a variety of concrete burden-sharing proposals (in the displacement context), evaluating their merit in relation to distributive justice and in relation to displacement in the climate change context. Conclusions as to the relevance of burden-sharing to climate change displacement will be drawn where possible in all sections outlined so far. However, before concluding the chapter, a penultimate section will consider in some detail the few burden-sharing proposals already made specifically in the climate change displacement context, arguing that most lack detail or an awareness of the shortcomings of existing burden-sharing arrangements concerning displacees.

2. Burden-Sharing and Distributive Justice

(Re)distribution – of burdens, costs, benefits – is fundamental to the concept of (international) burden-sharing. Motivations for participating in this form of (re)distribution vary, however, and how they may be connected to justice is complex. Essentially, incentives to participate in international burden-sharing are thought to revolve around two key considerations. Jean-Pierre Fonteyne, for example, argues that what motivates states can be both their functional and moral concerns.⁸ Two

⁸ J-P L Fonteyne, 'Burden-Sharing: An Analysis of the Nature and Function of International Solidarity in Cases of Mass Influx of Refugees' (1980) 6 *Australian Yearbook of International Law*

particular schools of thought are highlighted by Eiko Thielemann:⁹ First, cost-benefit approaches to burden-sharing stipulate that it is principally driven by rational consideration, whereby costs and benefits of unilateral versus cooperative action are evaluated and balanced against each other by an actor.¹⁰ Thielemann argues that public goods theory, in particular, underlines that collective action can generate ‘positive-sum benefits’ (including across borders), which can outweigh any negative consequences (i.e. costs) that may be accrued and which in turn propels individual actors (e.g. states) to participate in sharing regimes, thereby fostering a greater *public* good (e.g. stability, etc.).¹¹ Relying on Noll, he argues it is also possible to view this dynamic through analogy with the rationale supporting insurance: Chapter Six of this thesis outlined how insurance may be motivated by a desire to implement no-fault compensation. However, the chapter also noted the risk pooling or management potential of insurance schemes. Thielemann argues that, when it comes to burden-sharing, individual actors may engage in it because they may have a comparable perception or expectation of the occurrence of a ‘negative shock’, and therefore may well be willing to pool resources, and thereby to share or disperse the (potential) burden, even where they are not themselves imminently faced with the ‘shock’ in question, with the expectation, however, that they are assisted should the ‘shock’ occur to them.¹² John Rawls’ concept of the ‘veil of ignorance’ is important here:

162. Note in this context also the discussion concerning ‘apology’ and ‘utopia’ in international law provided in ch 4 of this thesis.

⁹ Eiko Thielemann, ‘Between Interests and Norms: Explaining Burden-Sharing in the European Union’ (2003) 16 *Journal of Refugee Studies* 253, 254ff.

¹⁰ Ibid, 255f.

¹¹ Ibid, 256; he cites Mancur Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965). See also Astri Suhrke, ‘Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action’ (1998) 11 *Journal of Refugee Studies* 396, 402.

¹² See, eg, Thielemann, ‘Between Interests and Norms’, above n 9, 256, and Eiko Thielemann, ‘Symbolic Politics or Effective Sharing? Redistribution, Side-Payments and the European Refugee Fund’ (2005) 43 *Journal of Common Market Studies* 807, 809 and Eiko Thielemann, ‘Burden Sharing: The International Politics of Refugee Protection’ (Working Paper 134, Center for

because at least some degree of uncertainty ('ignorance') about the magnitude or timing of future 'burdens', 'costs' or 'shocks' may exist, individual actors pursue distribution, accepting implicitly that the 'burden' thereby created might be greater, but hopefully lesser, than the one an actor might otherwise face individually and by chance.¹³

But actors such as states may also desire to act 'morally'¹⁴ or 'appropriately'¹⁵ – in other words, in light of more normative considerations: Thielemann focuses in particular on the concept or principle of solidarity also known to international law, which promotes 'special obligations', particularly amongst those who share the characteristics of a group. He argues more specifically that '[s]olidarity can be understood as a concern for other members of a group, which may be expressed by an unwillingness to receive a benefit unless the others do, or an unwillingness to receive a benefit when this will harm them.'¹⁶ The Marxian undercurrents of such thinking were highlighted in Chapter Four. What this also seemingly implies, however, is that commitments to burden-sharing are possible only amongst individual actors which are already bound and committed to each other on some level¹⁷ (perhaps beyond the UN Charter, for example, which binds all states). Philipp Dann therefore argues that concepts invoking collectivity – e.g. solidarity, sharing – are fundamentally different and more exclusionary from concepts of justice, which

Comparative Immigration Studies, University of California, 2006) 15; relying on Noll, above n 6, 241.

¹³ Eg, Thielemann, 'Symbolic Politics', above n 12, 809 and Thielemann, 'Burden Sharing', above n 12, 15. See also John Rawls, *A Theory of Justice* (Oxford University Press, revised ed, 1999); more concerning Rawls also in ch 4 and ch 7 of this thesis.

¹⁴ Fonteyne, above n 8.

¹⁵ Thielemann, 'Between Interests and Norms', above n 9, 254.

¹⁶ Ibid, 257.

¹⁷ Ibid, 258.

aim to be more truly universal and applicable universally.¹⁸ But this, of course, depends on which justice paradigm or construct one subscribes to. Certainly, the original Aristotelian construction of distributive justice (and those that flowed from it in the centuries thereafter) was premised precisely on the notion that it is about merit and desert, and access to benefits and sharing of burdens, arising in relation to membership in politically (or otherwise) bound communities.¹⁹

The justice foundations of burden-sharing are thus subtly different from those discussed in the previous chapter. From a justice perspective, the basis for distribution in burden-sharing arrangements is not so much that something is owed because one party has contributed to creating the burden another is faced with, or has benefitted unjustly from processes that create burdens for others; in other words, a disproportionality between benefits and burdens which is causally linked (as is certainly the case in the climate change context). Rather, something is owed because a disproportionality simply exists between two parties, without the causal link between the generation of burdens and benefits. Sharing (distribution) here, then, occurs because of relations of reciprocity (the links between separate entities, not between cause and effect), either concerning those who co-exist in bound communities where separate entities also exist as some kind of ‘us’, and where disproportionality of burdens and benefits is addressed on account of that boundedness (roughly the Aristotelian notion of distributive justice), or because of the possibility that another’s disproportionate burden may someday become ‘mine’, in which instance ‘I’ would require assistance to the same degree ‘I’ offer it (roughly the Rawlsian notion of distributive justice, whereby action is premised on the

¹⁸ Philipp Dann, ‘Solidarity and the Law of Development Cooperation’ in Rüdiger Wolfrum and Chie Kojima (eds), *Solidarity: A Structural Principle of International Law* (Springer, 2010) 55, 58.

¹⁹ See ch 4 of this thesis.

possibility that the most burdened actor may someday be ‘me’, a notion akin to what is known in philosophy and ethics more generally as ‘enlightened self-interest’²⁰). Later sections of this chapter will highlight how such motivations to share (distribute) have played out in relation to displacement.

Questions as to ‘why’ sharing through burden-sharing regimes or relations is engaged in by individual actors such as states must also be coupled with questions as to ‘what’ is commonly shared or (re)distributed. Here, Noll stresses three fundamental categories typically highlighted by states, or evidenced in their behaviour, in the displacement context: a) sometimes the ‘sharing of the burden of preventing and resolving displacement crises’;²¹ b) sometimes the ‘sharing of the burden of preventing and deflecting arrivals’; or c) sometimes actually ‘sharing the burden of reception’.²² Within these categories three types of sharing are usually engaged in to affect the desired ends: a) norm sharing; b) fiscal sharing; and c) the actual sharing of protection/assistance seekers.²³ All three have been utilised by states to impact the aforementioned categories:²⁴ Noll explains that norm sharing, for example, is about policy harmonisation to ensure a similar level of protection and assistance is available to arrivals amongst sharers. He shows how this has occurred particularly in the context of the European Union. Sometimes norm sharing is about implementing common minimum standards, sometimes about the even distribution of arrivals, sometimes about the common goal to return arrivals or prevent their arrival in the first place (naturally the least ‘just’ option, as this ignores those Rawls would likely class as most in need or least-well off). Fiscal sharing, he argues,

²⁰ See, eg, Samuel Scheffler, *Human Morality* (Oxford University Press, 1993).

²¹ In the climate change displacement context, this is arguably tied to states’ willingness to engage in climate change mitigation and adaptation measures, the subject of the previous chapter.

²² Noll, above n 6, 242

²³ Ibid, 243.

²⁴ Ibid, 243f; also Thielemann, above n 2, 230ff

accepts that protection/assistance burdens may physically be unevenly distributed, which is countered, however, through financial support from other group members. Noll highlights that the difficulty raised, of course, is that it is often challenging to calculate exactly the full cost of reception and integration (monetarily or otherwise), or post-integration benefits, which is why the sharing of actual persons (displacees) is sometimes thought more fair and balanced, though not necessarily for the individuals concerned, who are turned into commodities in such processes.²⁵

To conclude, burden-sharing is imbued with the notion of distribution, though justice features in this in sometimes ambiguous ways. On the one hand, individual actors such as states may decide to share because they operate from behind a ‘veil of ignorance’ which encourages sharing because each individual state cannot fully anticipate future burdens and their ability to cope with such burdens independently. On the other hand, states may share because they perceive themselves to be a member of a group which warrants sharing out a sense of solidarity and belonging (Aristotle, but also Marx, are important here). Sharing operates in different ways and to affect different outcomes in the displacement context. This may include actual sharing – of costs, burdens, resources, persons – as much as the deflection of burdens (the Fortress Europe dynamic, for example). Section Four will further explore how these motivations and dynamics have played out in practice, in particular during a series of prominent displacement scenarios. The following section, however, will first seek to position the idea of international burden-sharing in a wider context of support for cooperation and solidarity in international law.

²⁵ Ibid, 244.

3. Sharing, Cooperation and Solidarity in International Law

The notion of sharing permeates international law and relations beyond the displacement context²⁶ and is reflected in recognised principles such as cooperation and solidarity, which encourage a commitment to support and assist one another across borders, and which, arguably, have been ‘gaining both recognition and importance in the structure of the contemporary international legal order.’²⁷ Referring specifically to the principle of solidarity, Dutch legal scholar Karel Wellens maintains that ‘[b]ecause [it] is operating across various branches of international law and it has permeated both primary and secondary rules, thereby protecting fundamental values of the international community, it is endowed with constitutional status’²⁸ and thus more than inspirational.²⁹ German scholar Rüdiger Wolfrum further highlights the transformative power of the solidarity principle: ‘[it] reflects the transformation of international law into a value based international legal order’.³⁰ Thomas Pogge and Charles Beitz might argue that this provides some support for the existence of a ‘basic structure of society’ across borders.

²⁶ Note also the previous chapter, which contained a section on how distributive justice, more generally, features in international law.

²⁷ See R St J MacDonald, ‘Solidarity in the Practice and Discourse of Public International Law’ (1996) 8 *Pace International Law Review* 259, 259. The *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States in Accordance with the Charter of the United Nations* stipulates: ‘States have the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and stability and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination [...]’. UNGA Res 2652(XXV) (24 October 1970).

²⁸ Karel Wellens, ‘Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections’ in Wolfrum and Kojima, above n 18, 3, 5.

²⁹ Ibid, 30.

³⁰ Rüdiger Wolfrum, ‘Solidarity amongst States: An Emerging Structural Principle of International Law’ in Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N Shaw and Karl-Peter Sommermann (eds), *Common Values in International Law – Essays in Honour of Christian Tomuschat* (Engel Verlag, 2006) 1087, 1087. Though many would argue that international law, as a discipline, has long been underpinned by a value-driven approach, even idealism; see, eg, C G Weeramantry, *Universalising International Law* (Martinus Nijhoff Publishers, 2004); see also the debate concerning NAIL outlined in ch 4 of this thesis.

As is the case with burden-sharing, the premise underpinning principles such as solidarity and cooperation is that states do (or should) act jointly and cooperatively in the pursuit of a ‘greater public good’³¹ (the aforementioned ‘enlightened self-interest’ idea), including through (re)distribution, for example of goods, money, expertise or, indeed, responsibilities.³² Ronald MacDonald notes how scholars have long argued for the fundamental importance of such norms: Eighteenth century German philosopher Christian Wolff, for example, contended that states have an obligation to work together to enhance their individual and collective condition.³³ Wolff’s contemporary, Swiss legal scholar Emer de Vattel, on the other hand, argued that solidarity is so foundational to an *international society* that it is not unlike a *jus cogens* norm, though he admits that there are doubts about its legal character.³⁴ Steinar Stjerno sketches more extensively the long history of the solidarity concept.³⁵ MacDonald notes how three schools of thought, in particular, began to crystallise over time in relation to the international legal character of the solidarity principle: One contended that solidarity creates obligations only where states expressly create such obligations for themselves, for example by signing a treaty which binds them. A second contended that even where the concept cannot create legal obligations, it nevertheless implies that rich countries must support poorer countries. A third, echoing de Vattel’s natural law tradition, contended that the principle is not a

³¹ States, in fact, arguably make this commitment through their membership in the United Nations, whose constitutive instrument, the UN Charter, which binds all UN members, requires that states take ‘joint and separate action’ for the achievement of an array of purposes, including, ‘the creation of conditions of stability and well-being [...] necessary for peaceful and friendly relations among nations’, in particular through the promotion of ‘higher standards of living’, ‘conditions of economic and social progress and development’, etc. See art 55 and art 56.

³² See, eg, Angela Williams, ‘Solidarity, Justice and Climate Change Law’ (2009) 10 *Melbourne Journal of International Law* 493, 498.

³³ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* [trans. Joseph H Drake (Clarendon Press, 1934)] [1764] 156-172, in MacDonald, above 27, 260.

³⁴ Emer de Vattel, *Le Droit des Gens ou Principes de la Souveraineté* (1758) Préliminaires ss 13; in MacDonald, above n 27, 2f.

³⁵ Steinar Stjerno, *Solidarity in Europe: The History of an Idea* (Cambridge University Press, 2005).

separate (or separable) commitment but a norm permeating and inspiring the entire international legal order.³⁶ In practice, the norms have struggled to conform to the demands of the first and second school, though they have found expression in a multitude of instruments and in a multitude of international law's arenas. Dann argues that they are 'easily invoked as ideal but as easily used as a smokescreen for inaction or to dilute clear responsibilities.'³⁷

A general commitment to cooperation, at least, is, of course, expressed in some of modern international law's primary instruments, including the UN Charter³⁸ and the *Universal Declaration of Human Rights*.³⁹ Beyond this, in relation to the international economic order, principles of cooperation and solidarity indeed underpinned calls for the establishment of the New International Economic Order (NIEO) in the 1970s,⁴⁰ discussed already in the previous chapter,⁴¹ which expressly called for greater justice and equity in global economic relations through the 'promotion of international social justice' and 'international cooperation for development'.⁴² However, the 'one-sidedness' of obligations arguably raised in the NIEO push may have contributed to its failure.⁴³ No more than non-binding declarations resulted from the NIEO effort and principles of solidarity and cooperation (or distributive justice, for that matter) can hardly be said to inform in

³⁶ MacDonald, above n 27, 262.

³⁷ Dann, above n 18, 55.

³⁸ Charter of the United Nations, eg, art 55 and art 56. Guy Goodwin-Gill and Jane McAdam note that 'States are under a duty to co-operate with one another in accordance with the UN Charter' and that 'States are bound by a general principle [...] to cooperate with other States in the resolution of such problems as emerge' [refugee flows, for example]. See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 3rd ed, 2007) 2, also 502f.

³⁹ Eg, art 22.

⁴⁰ See, eg, *Charter of Economic Rights and Duties of States*, GA Res 3281, UN Doc A/3281 (1974) and *Declaration of 1 May 1974 Concerning the Establishment of a New International Economic Order*, UNGA Res 3201, UN Doc A/RES/S-6 3201 (1 May 1974); henceforth also 'NIEO Declaration'.

⁴¹ Ch 7 of this thesis.

⁴² See NIEO Declaration, above n 40, Preamble, p 3 and ch 1(m) and 1(n).

⁴³ MacDonald, above n 27, 265, 280.

significant ways the current international economic order. Although institutions such as the World Trade Organisation (WTO) are ‘engines for creating global wealth’, they have hardly ‘confronted directly questions regarding the global distribution of its benefits.’⁴⁴

Somewhat more successfully, notions of cooperation and solidarity underpin international environmental law,⁴⁵ albeit also usually in soft law form: decades ago already, the 1972 Stockholm Declaration highlighted that there is a need ‘for a common outlook and for common principles to inspire and guide the peoples of the world’.⁴⁶ Resulting from the Declaration, the Organisation for Economic Co-operation and Development’s Principles Concerning Transfrontier Pollution were developed, its non-binding Preamble states that ‘the common interests of countries concerned by transfrontier pollution should induce them to cooperate more closely in a spirit of international solidarity [...]’.⁴⁷ The Rio Declaration, adopted at the 1992 UN Conference on Environment and Development, emphasised the importance of cooperation in order to achieve sustainable development, poverty eradication and more equitable living standards,⁴⁸ to be realised, amongst other things, through cooperation in science and technology and ecosystems protection, in particular with reference to states’ common but differentiated responsibilities.⁴⁹ Similar goals also underpin the United Nations Framework Convention (UNFCCC), adopted at the same gathering.⁵⁰

⁴⁴ Joel P Trachtman, ‘The Constitutions of the WTO’ (2006) 17 *European Journal of International Law* 623, 641.

⁴⁵ International environmental law was also investigated in the previous chapter for its incorporation of distributive justice, more generally.

⁴⁶ Preamble.

⁴⁷ See Organisation for Economic Co-operation and Development, ‘Recommendation of the Council on Principles Concerning Transfrontier Pollution’ (1975) 14 *ILM* 242; in McDonald, above n 27, 25.

⁴⁸ Especially Principle 5.

⁴⁹ See, eg, Principle 7 and Principle 9.

⁵⁰ The previous thesis chapter outlined this in relation to the UNFCCC in greater detail.

International human rights law is a further arena where international cooperation and solidarity feature, and perhaps most prominently.⁵¹ In addition to the aforementioned Universal Declaration, they are expressed, for example, in the *International Covenant on Social, Economic and Cultural Rights*,⁵² the *Convention on the Rights of the Child*⁵³ and the *Convention on the Rights of Persons with Disabilities*,⁵⁴ all of which leave little doubt that enjoyment of the economic, social or cultural rights they enshrine may depend on international cooperation, solidarity and assistance, given the prevailing socio-economic disparities amongst the various signatories, enabling some, more than others, to guarantee the enjoyment of such rights independently. The nature or scope of the obligations enshrined in such instruments is debated: in a General Comment concerning Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), for example, which asks states parties ‘to take steps, individually and through international assistance, solidarity and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [...] Covenant’, the Committee on Economic, Social and Cultural Rights (CESCR) has stipulated ‘that the phrase “to the maximum of its available resources” was intended [...] to refer to both the resources existing within a State *and* those available from the international community through international cooperation and assistance’.⁵⁵ More explicitly

⁵¹ Though note that cooperation, solidarity, assistance and sharing find mention in many other international law regimes, including those concerning humanitarian assistance and international development; see the various perspectives in Wolfrum and Kojima, above n 18.

⁵² Eg, Art 2 [cooperation].

⁵³ Eg, Preamble and art 4 [cooperation and solidarity].

⁵⁴ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entry into force 3 May 2008) Preamble and art 2 [cooperation].

⁵⁵ Office of the High Commissioner for Human Rights (OHCHR), ‘The Nature of States Parties Obligations (Art. 2, par. 1, of the Covenant)’, General Comment 3, 14 December 1990, para 13. [italics added by thesis author]. Note that, however, that Article 2(3) of the ICSECR provides an opt

addressing the scope of the obligation to assist and to cooperate, the same Comment emphasises that

in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant [ICESCR] itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States.⁵⁶

The United Nations Social and Economic Council has further argued that certain core rights ‘give rise to national responsibilities for all States and international responsibilities for developed States, as well as others that are “in a position to assist”’.⁵⁷ In essence, such statements also involve an obligation that states without the means to guarantee economic, social or cultural rights must *seek* the assistance of the international community.⁵⁸ CESCR has also specifically confirmed duties of cooperation and assistance in relation to both refugees and internally displaced persons (IDPs): ‘States have joint and individual responsibility [...] to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability.’⁵⁹ The latter (‘in accordance with ability’) presents an important ‘out-clause’. Other restrictions upon the scope of cooperation and assistance duties in the human rights context include that they are construed to

out clause of sorts which permits that developing countries may determine separately to what extent they would guarantee economic rights to aliens.

⁵⁶ Ibid, para 14.

⁵⁷ United Nations Social and Economic Council, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C12/2001/10 (10 May 2001) para 16.

⁵⁸ See Margit Ammer, ‘Klimawandelinduzierte Umweltveränderungen als Ursache für unfreiwillige Binnenmigration: Ist Europa Verpflichtet zu Helfen?’ [Climate Change-Induced Environmental Change as Cause of Forced Migration: Is Europe Obligated to Assist?] (2010) 4 *Zeitschrift für Menschenrechte* 48, 65.

⁵⁹ Office of the High Commissioner for Human Rights, ‘The Right to Food’, General Comment 12, 12 May 1999, para 38. The duty to cooperate in the event of disasters is also reiterated by the International Law Commission, ‘Protection of Persons in the Event of Disasters: Texts of Draft Articles 1, 2, 3, 4, 5 as Provisionally Adopted by Drafting Committee’, UN Doc A/CN.4/L758 (24 July 2009) art 5.

relate only to a limited array of core rights, referred to also as the ‘minimum core’.⁶⁰ Finally, it is important to note that CESCR Comments or Social and Economic Council Statements, though vital in delineating obligations, cannot create binding legal obligations.

Final Words

International cooperation and solidarity do exist as general principles of international law. Some ascribe constitutional character, particularly to solidarity. Others disagree, arguing that although the principles underpin modern international law, they are little more than inspirational and guiding and are easily ignored in practice.⁶¹ In principle, it is acknowledged that acting with solidarity and in cooperation fosters a greater common global good and greater equity amongst states and their inhabitants. The principles have emerged in varying contexts and with varying degrees of success: in attempts to imbue the international economic order with greater equity and justice, solidarity and cooperation were evoked to permit fairer participation in and access to global economic relations. However, no binding obligations emerged. In the international environmental order, soft law norms such as sustainable development and common but differentiated responsibilities are more expressly underpinned by the principles of solidarity and cooperation (and of justice, as the previous thesis chapter argued), although they too cannot bind states to specific commitments. Promisingly, although wealthy states have rejected a duty of solidarity and cooperation in relation to the global economic order, international human rights law

⁶⁰ See, eg, Wouter Vandenhoe, ‘EU and Development: Extraterritorial Obligations under the ICESCR’ in Margot E Salomon, Arne Tostensen and Wouter Vandenhoe (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia, 2007) 85, 95. Concerning the ‘minimum core’ see Katherine G Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *The Yale Journal of International Law* 113.

⁶¹ See, eg, ‘Discussion Following the Presentation by Karel Wellens’ in Wolfrum and Kojima, above n 18, 39ff.

nevertheless stipulates that states ought to comply with a duty of assistance, support and cooperation where other states are unable to provide for the enjoyment at least of a core array of rights independently.

The following section will seek to investigate more explicitly how sharing and cooperation have played out in relation to displaced persons. It will explore the extent to which the particular concept of burden-sharing has emerged within international legal instruments, at least as an aspiration, especially in the refugee context, as well as the extent to which it has been engaged in, especially during a series of prominent instances of mass influx.⁶²

4. Burden-Sharing and Displacement: How, When and Why?

Uncertainties and unenforceability plaguing the principles of solidarity and cooperation also dog the related concept of burden-sharing⁶³ in the regimes dealing with displaced persons. Two things are worth noting from the outset: First, as the following sub-section will show, the concept appears widely in international instruments concerning displaced persons, in particular refugees. Mention of it precedes even the contemporary refugee regime. Secondly, however, although widely incorporated in important protection instruments, specific commitments do not usually arise and are left subject to discretionary decision-making. Burden-sharing is encouraged and desired but coupled with a hesitancy to commit to sharing concretely.

⁶² Justifying the relevance of burden-sharing particularly in instances of mass influx is Fonteyne, above n 8.

⁶³ Karel Wellens refers to burden-sharing in the refugee context as, in part, 'solidaristic'; see Wellens, above n 28, 33.

Even prior to the emergence of the contemporary refugee protection regime, the UN General Assembly urged its members at its first session in 1946 ‘to give the most favourable consideration to receiving each [...] its fair share of the non-repatriable persons who are the concern of the International Refugee Organisation’.⁶⁴ The non-binding Paragraph 4 of the Preamble of the 1951 Refugee Convention then underscored ‘that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation’. The 1969 OAU *Convention Governing the Specific Aspects of Refugee Problems in Africa* also contains a burden-sharing provision in Article 11(4):

Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum [...].

Guy Goodwin-Gill and Jane McAdam note a ‘striking instance of a formal obligation to assist’⁶⁵ in the 1989 inter-regional Lomé IV Convention (binding the European Communities (at the time) and several African, Caribbean and Pacific countries), which provided for inter-country assistance in response to refugee or returnee intakes in the following context:

254(1) Emergency assistance shall be accorded to ACP States faced with serious economic and social difficulties of an exceptional nature resulting from natural disasters or extra-ordinary circumstances having compatible effects...

254(2) The Community shall take adequate steps to facilitate speedy action which is required to meet immediate needs for which emergency assistance is intended.

225(1) Assistance may be granted to ACP States taking in refugees or returnees...⁶⁶

⁶⁴ United Nations, ‘Refugees and Displaced Persons’, UNGA Res 61(1), 67th Plenary Meeting, 15 December 1946, para e.

⁶⁵ Goodwin-Gill and McAdam, above n 38, 503.

⁶⁶ *Fourth ACP-EEC Convention*, signed 15 December 1989.

The Convention was succeeded by the Cotonou Agreement in 2003, which again provides that '[a]ssistance may be granted to [...] States or regions taking in refugees or returnees to meet acute needs not covered by emergency assistance.'⁶⁷

A particular and important debate concerning burden-sharing in the refugee context has emerged in relation to states' *non-refoulement* obligations. To understand it, it is important to underscore further the context in which burden-sharing is most often highlighted. The Preamble to the Refugee Convention already noted that burden-sharing is vital where an 'unduly heavy burden' would otherwise be placed upon a receiving state. Such an understanding was also enshrined in the UN General Assembly Declaration on Territorial Asylum of 1967, which stipulated that '[w]here a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations, shall consider, in a spirit of international solidarity, taking appropriate measures to lighten the burden on that State.'⁶⁸ UNHCR (itself described as 'the fulcrum of the system of burden-sharing, co-ordinating, monitoring and supervising the equitable distribution of the burden of responsibility'⁶⁹) has highlighted sharing duties where receiving states are under duress more strongly, particularly in the mass influx context, in EXCOM Conclusion 22:

[a] mass influx [which] may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international cooperation. States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx.⁷⁰

⁶⁷ The Cotonou Agreement, signed 23 June 2000, OJ L 287 (4 November 2010) (entry into force 1 April 2003) art 72(A)(2).

⁶⁸ United Nations General Assembly, *United Nations Declaration on Territorial Asylum*, Resolution 2312 (XXII), 14 December 1967, art 2(2).

⁶⁹ Chaloka Beyani, 'Refugee Protection and Burden Sharing in the Context of International Cooperation Between States' (Briefing Paper, GAP Consultations on the International Protection of Refugees, 1997) 3.

⁷⁰ Office of the United Nations High Commissioner for Refugees, Executive Committee, 'Conclusion 22 – Protection of Asylum Seekers in Situations of Large-Scale Influx' (1981) para IV(1).

The debate which has erupted concerns whether states' *non-refoulement* obligations apply, particularly in mass influx situations, *only* where they can rely upon the assistance of third states. Goodwin-Gill and McAdam, though arguing that *refoulement* is not permissible even under the most trying circumstances,⁷¹ for example, cite multiple instances where only substantial financial and other commitments by third-party states ensured adherence to *non-refoulement* obligations by receiving states.⁷² James Hathaway, relying on EXCOM Conclusion 22, argues more strongly that the duty of *non-refoulement* may indeed only apply 'so long as there is reason to believe that the risk to [a state's] critical national interests occasioned by the mass influx will be countered by timely assistance from other states', though this should be an option only where a state 'might otherwise be overwhelmed and unable to protect its most basic national interests.'⁷³ However, a 1998 EXCOM Conclusion, which followed one of the more significant instances of refugee burden-sharing in recent history (the subject of greater discussion in the following sub-section), stated that although 'international solidarity and burden-sharing are of direct importance to the satisfactory implementation of refugee protection principles; access to asylum and the meeting by States of their protection obligations should *not be* dependent on burden-sharing arrangements first being in place',⁷⁴ thus emphasising that *non-refoulement* and protection remain a duty independent of collective action.

⁷¹ Goodwin-Gill and McAdam, above n 38, 335.

⁷² Ibid, 336ff.

⁷³ James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 359, 360 [italics in original].

⁷⁴ Office of the United Nations High Commissioner for Refugees, Executive Committee, 'Conclusion 85 – Conclusion on International Protection' (1998) para p [italics by thesis author]. Note Durieux and McAdam who argue that because 'the bulk of Convention guarantees are simply ignored in situations of mass influx', the inclusion of a derogation clause to the Refugee Convention would also provide 'States [with] "valuable breathing space" during the emergency phase'. See Jean-François

The scope of legal obligations to international burden-sharing in the displacement context remains uncertain. In the meantime, the debate concerning mass influx, *non-refoulement* and burden-sharing is not only theoretically or academically relevant, as the following sub-sections will show. The goal of the pages to follow is to detail how burden-sharing has taken place in practice. The sub-sections will analyse the nature and scope of sharing, how this relates to justice and how this may, in turn, be relevant to sharing in the context of climate change and displacement.

Origins

Agnes Hurwitz locates the emergence of displacement and refugeehood as issues subject to *international* legal attention and interaction in the nineteenth century, especially in the context of extradition.⁷⁵ Astri Suhrke notes that the issue of disproportionalities between states in receiving and caring for displaced persons first notably arose at an inter-state conference held in 1938 in France,⁷⁶ where an Intergovernmental Committee on Refugees was sought, but failed, to be created to provide assistance in particular in the context of Jewish flight from Nazi Germany.⁷⁷ The aforementioned conditions conducive to sharing – boundedness, adherence to *enlightened* self-interest – did not exist at a time of impending war and economic depression, with most states simply resorting to the default ‘self-interest’ option.⁷⁸

Durieux and Jane McAdam, ‘*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 *International Journal of Refugee Law* 4, 23.

⁷⁵ See Agnes Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 10.

⁷⁶ Astri Suhrke, ‘Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action’ (1998) 11 *Journal of Refugee Studies* 396, 403.

⁷⁷ Also Hurwitz, above n 75, 11.

⁷⁸ Suhrke, above n 11, 403.

Concerted cooperation in assisting displaced persons emerged after the War, even though the numbers concerned were much greater and little hope could be placed on repatriation in most cases.⁷⁹ Under the auspices of the newly-created International Refugee Organization (IRO), over a million refugees and other displaced persons were therefore resettled in the years following the war, largely in Europe and the North Atlantic.⁸⁰ Commitment to such a large-scale operation originated in the fact that the burden-sharing it entailed was, relatively speaking, an 'internal affair': the war itself, displacees, as well as resettlement countries were all tied to Europe in some form.⁸¹ What was shared, in other words, was not only the 'burden' but, in the words of Astri Suhrke, also 'a sense of belonging to a larger community which carried associated obligations.'⁸² The sense of boundedness alleged to be necessary for acting in concert (Aristotle's merit or desert essential to distributive justice), in other words, seemingly existed. Suhrke, amongst others, also points to resettlement countries' economic priorities – e.g., post-war reconstruction and nation building – and the fact that resettlement, though significant, was considered a 'one-time affair' as factors which contributed to burden-sharing efforts.⁸³ Ultimately, no lasting burden-sharing mechanism emerged but enough countries were motivated – whether by macro-economic urgency (self-interest, enlightened or not), a sense of historical and cultural responsibility (boundedness) or even humanitarianism (enlightened self-interest, boundedness) – to affect cooperation. And the notion of burden-sharing did soon appear in the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and

⁷⁹ Ibid, 404.

⁸⁰ Ibid. Though countries further afield, such as Australia and several South American countries, also resettled a sizeable number, largely a result of 'hungry' labour markets in such places.

⁸¹ Ibid, 404.

⁸² Ibid.

⁸³ Ibid, 404f.

Stateless Persons, which advocated that: ‘governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees might find asylum and the possibility of resettlement’.⁸⁴

Southeast Asia – Post-1975: Merit or Enlightened Self-Interest?

Commitment to burden-sharing was next tested most severely in connection with the significant flow of displaced persons in Southeast Asia from the mid-1970s. In particular, years of wide-spread human rights abuses, political persecution and increasingly poor living conditions following the surrender of South Vietnam resulted in 600,000 Vietnamese displacees by 1979.⁸⁵ Wider regional instability also led to 350,000 Vietnamese and Laotian refugees languishing in regional camps, with over 500,000 Cambodians dispersed at the Thai border, often forcibly returned when they did cross the border.⁸⁶ Lending the phenomenon its name, thousands of ‘boat people’ were also scattered in regional waters, many refused disembarkation by potential receiving states, thereby facing destitution and death at sea.⁸⁷ Sharing amounted to little more than a shared refusal to protect.⁸⁸

The gravity and visibility of the situation soon led to an international conference convened in Geneva in 1979, attended by delegations from 65 states, which sought to devise a regional, even inter-regional responsibility- or burden-sharing

⁸⁴ United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, UN Doc A/CON.2/108/Rev.1 (25 July 1951) Recommendation D (International Cooperation in the Field of Asylum and Resettlement).

⁸⁵ See Arthur C Helton, ‘The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control’ (1990-1991) 8 *New York Law School Journal of Human Rights* 111, 112 and Suhrke, above n 11, 405.

⁸⁶ W Courtland Robinson, ‘The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck’ (2004) 17 *Journal of Refugee Studies* 319, 319.

⁸⁷ Ibid; also Cecilia Bailliet, ‘The Tampa Case and its Impact on Burden-Sharing at Sea’ (2003) 25 *Human Rights Quarterly* 741.

⁸⁸ Robinson, above n 86, 322.

mechanism. Although the conference underlined that adherence to the joint principles of ‘first asylum’ and ‘*non-refoulement*’ remained vital, commitment to these principles was to be fostered through international monetary and resettlement pledges by third states,⁸⁹ therefore effectively asking for no more than the provision of very temporary protection of receiving countries, thereby relieving such states of their ‘burden’, an understanding referred to sometimes cynically ‘an open shore for an open door’.⁹⁰ And although no formal mechanism emerged, global resettlement and monetary pledges to UNHCR grew immediately and significantly.⁹¹ A staggering 700,000 persons were resettled in a relatively short timeframe, many in Western countries, especially to the United States, still reeling from the trauma of the Vietnam War.⁹²

Two things are important to note: First, the scheme evidences the international community’s willingness to cooperate and share in particular where the mass influx of displaced persons is concerned, which, as was highlighted in the previous section, provides a particularly compelling impetus to share. Furthermore, the influx, too, occurred within the particular ideological environment of the Cold War. As Suhrke has argued, ‘[e]ven with the widely publicised plight of the “boat people”, it is doubtful that humanitarian imperatives alone would have sufficed to sustain a refugee programme of this magnitude.’⁹³ Is it possible to locate justice aspects in this? In the Rawlsian enlightened self-interest sense, the sheer magnitude of displacement seemed to warrant action that was acknowledged to be for the greater good (i.e. a less unstable region, enhanced protection for protection seekers). In the

⁸⁹ See Helton, above n 85, 113. See also the discussion in the preceding sub-section.

⁹⁰ See Robinson, above n 86, 320

⁹¹ Ibid, 319f.

⁹² See Suhrke, above n 11, 405f.

⁹³ Ibid, 406.

Aristotelian sense, it may be possible to argue that sharing was merited because sharers and sharees allegedly occupied overlapping political and ideological ground.

Over time, the scheme began to fail. A new, more comprehensive and more formal mechanism was therefore devised in 1989 (this time at a gathering comprised of over 70 delegations), known as the Comprehensive Plan of Action (CPA), which brought to an end large-scale resettlement⁹⁴ and instituted systematic screening (out) and repatriation instead.⁹⁵ Supporters of this scheme have emphasised its responsibility-sharing components: '[it provided] the first attempt to implicate all concerned parties – countries of asylum, of origin, and of resettlement – as well as the donor community in a co-ordinated, solution-oriented set of arrangements for the sharing of responsibilities for [a] refugee population'.⁹⁶ Others have called it a 'remarkable instrument of burden-sharing', which demonstrates 'the value of a multi-lateral framework, supported by the United Nations, in marshalling the political capital and resources needed to address issues as diverse as mass human displacement, security and development across and within regions.'⁹⁷ In other words, it has been noted that the scheme was able to respond to a complex set of circumstances and to the varying interests of an array of actors.

Nevertheless, it also raised the possibility of forced return of those screened-out.⁹⁸ And by the mid-1990s states in the region argued that providing even temporary asylum to regional displacees had become a burden 'intolerable and

⁹⁴ Ibid.

⁹⁵ Ibid; also Robinson, above n 86, 320 and Helton, above n 85, 111.

⁹⁶ Erica Feller, 'The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime' (2001) 5 *Washington Journal of Law and Policy* 129, 133.

⁹⁷ Richard Towle, 'Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?' (2006) 18 *International Journal of Refugee Law* 537, 569.

⁹⁸ Robinson, above n 86, 321f.

[which] cannot continue'.⁹⁹ The Southeast Asian refugee calamity, in other words, did not ultimately lead to continuous regional or inter-regional burden-sharing.

What does this mean for justice and for climate change-induced displacement? First, that burden-sharing is seemingly engaged in only in response to the mass influx of one type of displaced persons – refugees. That this presents a significant hurdle for those displaced by the effects of climate change is an issue already discussed in Chapters Two and Three. Climate change effects are not usually capable of turning people into legally recognised refugee; and not all those who have to move will do so *en masse*, especially where gradual, slow-onset changes are concerned. Secondly, distributive justice operates at times in both the Aristotelian and Rawlsian sense – sharing is engaged in where it is possible to locate shared political ground (the Aristotelian merit) or opportunities for fostering the greater good through the prevention of spreading instability (Rawls and enlightened self-interest). When these conditions subside, or fail to materialise in the first place, however, sharing is ceded or is doubtful.

Europe in the 1990s: Reciprocity and Enlightened Self-Interest?

Conditions for at least the contemplation of burden-sharing in the displacement context have existed promisingly and prominently in the more tightly-bound setting of the European Union (EU). Calls for a Common European Asylum System (CEAS) grew over the years in what has become the EU.¹⁰⁰ Vital to such a system was to be an inter-country burden-sharing mechanism founded in common norms

⁹⁹ Association of Southeast Asian Nations (ASEAN), 'Joint Statement – The ASEAN Foreign Ministers on the Problem of Vietnamese Boat People' (24 July 1990), para 1 <<http://www.aseansec.org/1060.htm>>.

¹⁰⁰ See, eg, Mathias Czaika, 'Asylum Cooperation Among Asymmetric Countries: The Case of the European Union' (2009) 10 *European Union Politics* 89, 90; also Europa, *Green Paper on the Future Common European Asylum System* (2007) <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/229>>.

and binding commitments.¹⁰¹ Decision-making procedures within the Union have held back the full-fledged establishment of such a system,¹⁰² however, despite repeated experience of, and participation in, burden-sharing on the continent. Following on from the distribution of refugees after World War II, in the context of the Cold War, this has also included joint participation in resettlement programmes for Hungarian, Czechoslovakian, Polish or other Eastern European refugees reaching various Western European countries from the 1950s to 1980s, sometimes in significant numbers.¹⁰³ Whilst cooperation and burden-sharing were principally motivated by Cold War ideology in many of these instances (Aristotle's boundedness), a more significant test to European commitment to burden-sharing occurred when Cold War dogma had all but disappeared and conflict emerging from the break-up of the former Yugoslavia generated significant (mass) displacement in the region. Over half a million people had arrived in various EU (and other) countries by 1993 and calls for burden-sharing quickly arose, driven, as Suhrke argues, by displacees' 'uneven distribution' and the fear that even more would follow.¹⁰⁴ Several developments arose in this context.

Initial proposals were focused on the idea of quota-based sharing within the EU, linked to each country's economic prowess and alleged 'absorption capacity',¹⁰⁵ a sort of 'common but differentiated responsibilities idea'. Non-EU states (at the time) such as Austria and Sweden envisioned a global scheme and called on 'all states of the world to offer shelter and to host, on a more equitable basis, in particular

¹⁰¹ Czaika, above n 100.

¹⁰² Ibid.

¹⁰³ European Commission, Directorate-General Home Affairs, *Study on the Feasibility of Establishing A Mechanism for the Relocation of Beneficiaries of the International Protection* (2010), 4 <http://ec.europa.eu/home-affairs/doc_centre/asylum/docs/final_report_relocation_of_refugees.pdf>.

¹⁰⁴ See Suhrke, above n 11, 407.

¹⁰⁵ European Commission, above n 103, 4.

displaced persons and war refugees from Bosnia and Herzegovina.’¹⁰⁶ Eventually, cooperation and sharing was agreed upon in principle amongst EU member states, though only temporary protection was the mechanism by which this was to be operationalised.¹⁰⁷

Subsequent documents and debates have tried to flesh out cooperation and burden-sharing: In early 1994, the European Parliament urged the European Commission to ‘draw up plans for a European Fund for Refugees’¹⁰⁸ and [...] an emergency plan for the reception of refugees which provides for them to be distributed evenly among the countries of the Community’.¹⁰⁹ Later that year, a Communication from the European Commission sought to clarify that although ‘the Union could try to establish some matching of national absorption capacities’, this would

not necessarily have to amount to a formal arrangement for burden-sharing, but [offering] reciprocal assurance among Member States that, when they are confronted with serious problems in implementing their reception policies, that they would not stand alone, but could reckon with active support from other Member States and from the Union itself’.¹¹⁰

Not satisfied, and impacted by the lion’s share of influx from the former Yugoslavia, Germany soon followed this up with a more concrete proposal that would see displacees distributed according to a) size of population; b) size of national territory

¹⁰⁶ See Migration Policy Group, ‘News Sheet 1993’ (1993); cited in European Commission, above n 103 [italics by thesis author].

¹⁰⁷ See, eg, Joanne Thorburn, ‘Temporary Protection and Burden-Sharing in Europe’ (1995) 7 *International Journal of Refugee Law* 459. Also Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, [2001] OJ L 212/12.

¹⁰⁸ Which has since emerged; see European Parliament and of the Council of the European Union, *Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 Establishing the European Refugee Fund for the Period 2008 to 2013 as Part of the General Programme ‘Solidarity and Management of Migration Flows’ and Repealing Council Decision 2004/904/EC*, [2007] OJ L144/1.

¹⁰⁹ European Parliament, *Resolution on the General Principles of a European Refugee Policy*, A3-0402/93, [1994] OJ C44/109, 16.

¹¹⁰ European Commission, *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM(94)23 final, 23 February 1994, para 98f.

and c) size of gross domestic product in the Union, which would have seen its own share reduced from 63 percent¹¹¹ to 21.6 percent in the context of displacement from the former Yugoslavia.¹¹² The final Resolution which emerged a year later (1995) was far less inspired, offering little more than general principles that would encourage states to act in a '*spirit* of solidarity' and to achieve 'even distribution' and 'harmonized action', without outlining specifically how and under what circumstances sharing was to be operationalized in future.¹¹³ Evidently, no more than general commitments to reactive sharing were possible – not even amongst states as closely bound as those belonging to the European Union.

The European burden-sharing 'experiment' has continued, though some accuse it of doing little more than reducing rights and benefits to their lowest common denominator (a 'race to the bottom'), with detrimental consequences for protection seekers.¹¹⁴ The afore-mentioned European Refugee Fund has become operational and in its current operating period has been allocated Euro 628 million.¹¹⁵ Through the Fund, EU member states (with the exception of Denmark) 'share the costs of reception, integration and voluntary repatriation' of international protection seekers (fiscal sharing).¹¹⁶ Despite the aforementioned challenges, at least some progress has also been made in relation to the desired Common European Asylum System, from which a number of instruments that include the idea of sharing have emerged: a) the

¹¹¹ See Suhrke, above n 11, 408.

¹¹² See European Commission, above n 103, 5.

¹¹³ See European Council, *Resolution on Burden-Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis*, 95/C/26201, [1995] OJC262 vol 38.

¹¹⁴ See, eg, A Bloch, T Galvin and L Schuster (eds), *Changing Asylum Policies in Europe* (2000) 13 *Journal of Refugee Studies* 9; also Eiko Thielemann, 'Why Asylum Harmonisation Undermines Refugee Burden-Sharing' (2004) 6 *European Journal of Migration and Law* 47.

¹¹⁵ See, eg, Office of the United Nations High Commissioner for Refugees, *European Refugee Fund* (2013) <<http://www.unhcr.org/pages/49c3646c305.html>>.

¹¹⁶ See Ibid.

Directive on Reception Conditions for Asylum-Seekers,¹¹⁷ which is about norm-sharing in reception conditions EU-wide; b) the Directive on Qualifications for Becoming a Refugee or a Beneficiary of Subsidiary Protection Status,¹¹⁸ which is also about norm-sharing in relation to how one becomes a refugee or eligible for complementary protection; c) the Asylum Procedures Directive,¹¹⁹ about norm-sharing in asylum procedures; and, finally, the Dublin Regulation,¹²⁰ which, to a degree, is arguably about the actual sharing (or rather distribution) of protection seekers.

What does this mean for climate change, displacement and for justice? Burden-sharing rhetoric, at least, is strong where potential sharers are historically, culturally or politically bound. Appeals that sharing is owed in such settings and that it fosters the common good are readily made. However, self-interest often prevails and group members even in tightly bound settings such as the EU try to shirk sharing or offer only a reduced quality of protection or assistance. Even where quantitative commitments to sharing may be increased, the quality is reduced, for example, by offering temporary instead of permanent shelter. Furthermore, firm and prolonged commitments revolve most commonly around norm or fiscal sharing, with greater

¹¹⁷ Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers*, [2003] OJ L31/18.

¹¹⁸ European Parliament and European Council, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted*, [2011] OJ L337/9.

¹¹⁹ Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, [2005] OJ L326/13.

¹²⁰ Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanism for Determining the Member State Responsible for Examining an Asylum Application lodged in one of the Member States by a Third-Country National*, [2003] OJ L50/1. Note that the Temporary Protection Directive is also part of the CEAS, Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof*, [2001] OJ L212/12, art 2(c).

hesitance to share actual displacees. Mostly, burden-sharing is ad-hoc and commitment to specific criteria by which sharing (especially of displacees themselves) is to be operationalised, or distribution affected, is often avoided. So even where strong group dynamics exist amongst states (Aristotle's boundedness), burden-sharing is resisted or engaged in only within limits.

Internally Displaced Persons

The chapter has considered so far largely commitments to sharing (or shifting?) the burden allegedly imposed by an influx of refugees, or *de facto* refugees. Burden-sharing debates, in general, tend to be mainly limited to this category of displaced persons. This ignores, however, questions of distribution (and therefore of justice), including spatially, which otherwise arise in the displacement context. By the end of 2012, for example, refugees made up less than one third (10.5 million) of the total population of concern to UNHCR (35.8 million) – but the internally displaced nearly half (17.7 million, a record).¹²¹ A map in UNHCR's Statistical Yearbook of the same year leaves little doubt that the latter are nearly exclusively located in developing countries,¹²² as are 81 percent of refugees.¹²³ Yet, categories of displaced persons other than refugees are not usually included in international burden-sharing debates or practice, equalling the lack of appetite for relieving the burden that is the uneven global spatial distribution of refugees (more on this in the following section). UN High Commissioner for Refugees, António Guterres, urged in 2010 that 'we really need a new deal on burden sharing', which would extend international solidarity to include the internally displaced and the disproportionately heavy burden of

¹²¹ Office of the United Nations High Commissioner for Refugees, *Statistical Yearbook 2012* (2013) 6; figures for 2013 were not available at the time of thesis submission.

¹²² *Ibid*, 32.

¹²³ *Ibid*, 8.

displacement prevalent in developing countries.¹²⁴ Nevertheless, such calls tend to be rhetorical for now and models of how to share non-refugees, or address disproportionalities in the refugee protection burden, either through reconsidering the distribution of funds or displacees, have been confined largely to the realm of theory. This reluctance is important when considering the relevance of burden-sharing in the climate change context: the fact that most of those affected will not be recognised as refugees has already been considered in some detail.¹²⁵ Emulating current global trends, there is an expectation that, more often than not, those who move will do so without crossing a border.¹²⁶ Even where a border may have been crossed, such movement may not cover long distances. What this would likely mean in turn is that the lion's share of displacees moving in response to climatic change could be hosted in regions already struggling, physically and financially, with large displacee populations. That this may not be just, given the responsibilities for displacement in the climate change context outlined in prior chapters, is indisputable. But whether a burden-sharing mechanism could relieve this injustice is undoubtedly less so. Prior sections have shown that sharing does occur, but that commitments to it are fostered by a variety of factors which include boundedness (as, for example, is the case in the EU) and merit (the ideological value of 'boat people'), factors which may or may not exist in relation to climate change-induced displacement, depending on how and where it occurs.

¹²⁴ António Guterres, in 'Senior UN Official Urges "Burden Sharing in Caring for the Internally Displaced', *UN News Centre* (online), 8 October 2010 <<http://www.un.org/apps/news/story.asp?NewsID=36385&Cr=idps&Cr1=>>.

¹²⁵ Esp in ch 3 of this thesis.

¹²⁶ See, eg, United Framework Convention on Climate Change, 'Climate Change, Migration and Displacement: Who Will Be Affected?' (Working Paper Submitted by the Informal Group on Migration/Displacement and Climate Change of the IASC) (31 October 2008), 1 <<http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf>>.

Final Words

International burden-sharing has been resorted to amongst individual nation states in the displacement context,¹²⁷ particularly in times of mass influx of refugees over the past sixty years. Where sharing occurs it arises from a number of motivations, amongst them historical responsibility, political expediency, sometimes a sense of solidarity or boundedness. Equally, the mass arrival of displacees is considered a burden; shifting it from one to the many is seen to generate some greater good (i.e. regional stability, no over-burdened states).¹²⁸ However, despite such motivations, few states make proactive, prolonged or concrete commitments to sharing, either of protection seekers or hosting costs.¹²⁹ Because displacee arrivals are viewed as an affliction, burden-sharing initiatives and commitments are sometimes coupled with exclusionary practices that curtail the extent of protection, rights or assistance afforded to displacees.¹³⁰

The willingness to cooperate and share depends on several factors, including the size of an influx, the proximity of an influx, ideology, prevailing economic and political conditions and priorities at the time of influx, and sometimes humanitarian concern (a sense of responsibility). A degree of existing inter-connectedness (the boundedness so important in the Aristotelian construct of distributive justice) may further influence at least the desire to engage in discussions about sharing, though the example of the European Union shows that sharing regimes are not always easy to negotiate even in the face of political and economic connectivity. Inevitably,

¹²⁷ Note that sharing and cooperation also feature as part of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, established in 2002, which seeks to devise shared strategies and practical cooperation, including around asylum management; see, eg, The Bali Process, *About the Bali Process* (2013) <<http://www.baliprocess.net/>>.

¹²⁸ Also Suhrke, above n 11, 412.

¹²⁹ Also *ibid*, 402.

¹³⁰ Also *ibid*, 412f

visibility and proximity are important factors, which explains in part why the notion of sharing rarely extends to the multitudes displaced especially in the global South, or in conditions of internal displacement.

What does this mean for climate change and displacement? If burden-sharing is to develop as a response mechanism, it will likely be reactive in situations of mass influx, with little hope of a proactive regime emerging. Sharing will be somewhat more likely at the regional level, or, more generally, amongst individual states with a history of sharing on other or similar matters.¹³¹ Sharing will likely concern only those displaced persons who have crossed a border. If sharing includes protection, then this will be limited, where at all possible, to temporary protection. More likely, sharing regimes will amount to fiscal sharing with the actual protection burden unevenly borne by different countries (as is the case in the EU, for example, with the establishment of its Refugee Fund) or the sharing of (sometimes very low) standards of treatment (norm sharing). Anticipating how burden-sharing could remedy displacement inequities which will likely arise under climate change is therefore complex. Before considering proposed burden-sharing mechanisms for climate change displacement in greater detail, the following section will consider proposals which have nevertheless been put forward to resolve the mounting global inequities in displacee distribution.

¹³¹ Also *ibid*, 413.

5. Sharing, Shifting or Trading? Prominent Proposals

Despite a mixed history of inter-state burden-sharing in response to displacement in the second half of the twentieth century, interest in the idea remains. The previous section noted that UNHCR has called for a ‘new deal on burden-sharing’, which would address distributional issues in refugee protection, as well as the internal displacement burden.¹³² Although such calls have not generated significant concrete action, a host of academic and policy proposals have nevertheless sought to revive interest in burden-sharing. Most acknowledge protection inequities but argue that international burden-sharing, especially through the large-scale transfer of money, could counter such inequities and should be in the interest of most states. The proposals concerned will be discussed and evaluated in light of the purposes of this chapter and thesis in the following sub-sections.

The Hathaway/Neve Proposal – Interest Convergence

Following years of consultation with various stakeholders throughout much of the early 1990s, James Hathaway and Alexander Neve prominently proposed sweeping changes to the contemporary refugee regime that would address on-going global inequities in refugee protection.¹³³ Acknowledging fundamental imbalances in global protection efforts and commitments, they proposed a system that was to benefit all stakeholders: Northern states, increasingly reluctant to accept refugees; Southern states increasingly faced with protection burdens; and, implicitly, protection seekers themselves who would benefit from a system at least fiscally better supported. Essentially, the system was to revolve around formal commitments to at least

¹³² See, eg, Guterres, above n 124.

¹³³ See James C Hathaway and Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* 115.

temporary protection¹³⁴ by Southern states and significant increases in particular of financial support by Northern states. In other words, inequities in the physical protection burden would remain but would be alleviated by financial sharing.

Sharing was to be operationalised through the formation of ‘interest convergence groups’, made up of hosting ‘inner core’ members of the Global South which could rely on the fiscal and other support of ‘outer core’ member from the Global North.¹³⁵ The alleged benefits to both entities have already been highlighted: relief from the fiscal burden of protection would be generated for one, relief from asylum seeker arrivals for the other. Because both groups would allegedly benefit, commitment to forming interest convergence groups was anticipated (it did not materialise). The fiscal burden for Northern participants was to be derived based on each country’s gross national product (GNP)¹³⁶ and application of the ‘common-but-differentiated’ responsibilities notion was to ensure fairness in the process.¹³⁷

The Schuck Proposal – Trading Refugees

Peter Schuck, writing from the ‘premise [...] that the current refugee regime is broke [...] and that it needs fixing’,¹³⁸ joins Hathaway and Neve in the late 1990s in proposing substantial reforms incorporating ‘burden-sharing’. In an opinion piece for the *New York Times* in 1994, he initially mused on the advantages of thinking about refugees as a tradeable commodity:

When a buyer values a car more than cash, and a seller prefers cash to her car, they cut a deal and both benefit. Now apply the principle to refugees.¹³⁹

¹³⁴ Ibid, 156f. .

¹³⁵ Ibid, 189f.

¹³⁶ Ibid 203ff.

¹³⁷ Ibid, 118, 202ff.

¹³⁸ Peter H Schuck, ‘Refugee Burden-Sharing: A Modest Proposal’ (1997) 22 *Yale Journal of International Law* 243, 247.

¹³⁹ Peter H Schuck, ‘Share the Refugees’ *The New York Times*, 13 August 1994, A21.

He later outlines in more detail the ‘novel’ but ‘modest’ idea of a market-like system by which an international agency would allocate refugee quotas based on national wealth and absorption capacities amongst various regions (he echoes Hathaway and Neve’s interest convergence group idea).¹⁴⁰ States would then be free to either themselves fulfil their protection obligations in relation to those refugees ‘assigned’ to them or to trade their obligations in a market like system.¹⁴¹ Arguing that states would likely be interested in such a system because many already helped to pay for protection efforts elsewhere, a process too informal and which suffers from serious limitations, however, Schuck argued that only a small further step was necessary to implement a more formal refugee market system ‘properly’.¹⁴²

The Betts Proposal – A Refugee Market

UK academic Alexander Betts, finally, supporting a UK government proposal of the same year,¹⁴³ also suggested ‘burden-sharing’ under a market mechanism in 2003.¹⁴⁴ Both were premised on the notion that the current asylum system (in Europe) was failing, though the government proposal, cynically, coincided with an announcement that protection seeker arrivals were to be halved, casting a shadow over its likely motivation for publishing *its* proposal. It emphasised the importance of burden-sharing and interestingly stipulated that this could best be implemented through the establishment of regional (off-shore) processing and protection centres, operating costs for which would be borne by Western European states. Four principles were to

¹⁴⁰ Schuck, above n 138, 277ff.

¹⁴¹ Ibid, 283.

¹⁴² Ibid, 282f [italics by thesis author]

¹⁴³ Home Office, *Concept Paper Presented by the Home Secretary to the EU Justice and Home Affairs Council Meeting: UK Proposals on Zones of Protection: New International Approaches to Asylum Processing and Protection* (2003).

¹⁴⁴ Alexander Betts, ‘The Political Economy of Extra-Territorial Processing: Separating ‘Purchaser’ from ‘Provider’ in Asylum Policy’ (Working Paper No 91, Office of the United Nations High Commissioner for Refugees, 2003).

achieve burden-sharing more specifically: a) increases in development aid;¹⁴⁵ b) enhanced protection in the place of origin or close to it (in said centres);¹⁴⁶ c) claims processing overseas and only limited, quota-based admission under burden-sharing rules into Europe;¹⁴⁷ d) an emphasis on repatriation.¹⁴⁸ In other words, much like the other proposals so far discussed, the UK government envisioned that the actual processing and hosting burden would be borne by poorer countries and the fiscal burden by those more wealthy.

Betts takes these suggestions a step further when he argues that ‘providers’ or ‘suppliers’ of protection should blatantly be separated from ‘purchasers’, which would lead to ‘efficiencies in the system’.¹⁴⁹ The ‘refugee market’ thereby created would mean that rational decisions could be made on both sides about the extent of desired participation (‘willingness to pay’ versus ‘willingness to receive’).¹⁵⁰ He concludes that such a system could help to overcome the ‘collective action failure associated with the burden-sharing debate’.¹⁵¹

Critiquing the Proposals

Critiques of the proposals have been numerous and have covered legal, practical and moral flaws.¹⁵² Deborah Anker, Joan Fitzpatrick and Andrew Shacknove have prominently highlighted the following: First, they fear that most burden-sharing proposals seemingly leave too much discretion as to how Northern states’

¹⁴⁵ Home Office, above n 142, 2.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid, 2-3.

¹⁴⁸ Ibid, 3.

¹⁴⁹ Betts, above n 144, 9, 15f.

¹⁵⁰ Ibid, 15.

¹⁵¹ Ibid, 22.

¹⁵² See, eg, Deborah Anker, Joan Fitzpatrick and Andrew Shacknove, ‘Crisis and Cure: A Reply to Hathaway/Neve and Schuck’ (1998) 11 *Harvard Human Rights Journal* 295 and Ronald C Smith, ‘Outsourcing Refugee Protection Responsibilities: The Second Life of an Unconscionable Idea’ (2004) 14 *Journal of Transnational Law and Policy* 147.

obligations, in particular, must be fulfilled. They are concerned about ‘cherry-picking’ amongst the more palatable options of the proposals (none, of course, have ever been implemented), with others ignored, which might lead to forced removals in the South when that region finds itself ill-supported,¹⁵³ thereby calling into question the triple-benefits often alleged in the proposals. Secondly, they note that under most burden-sharing proposals affected persons would likely have little or no recourse to the law.¹⁵⁴ Thirdly, they challenge the commodification of asylum seekers involved in market-like approaches to burden-sharing and that they could become ‘an object for bargaining’.¹⁵⁵ Finally, they challenge the concept of ‘absorptive capacities’ implicit in most of the proposals, which many Northern states argue they have long surpassed, even though ‘no quantifiable and morally valid indicators of such capacities exist.’¹⁵⁶ Other authors have pointed to the near- likeness to trafficking of some of the schemes.¹⁵⁷ Schuck’s proposal, incredulously, includes a suggestion that payment to receiving states in the South could be made, amongst other things, through the transfer of weapons.¹⁵⁸

Considering the proposals’ relevance for climate change displacement and for justice brings up other issues: First, most support temporary over permanent protection and emphasise repatriation, which makes them difficult to apply in situations where environmental change has led to permanent damage. Secondly, with protection or processing centres and protection obligations physically expected to be located in poorer countries, whose vulnerabilities to climate change have already been addressed in previous chapters, protection seekers might find themselves

¹⁵³ Anker et al, above n 152, 304f.

¹⁵⁴ Ibid, 305.

¹⁵⁵ Ibid, 304f.

¹⁵⁶ Ibid, 306.

¹⁵⁷ Smith, above n 152, 150.

¹⁵⁸ Schuck, above n 138, 284 (a ‘modest’ proposal?).

located in situations of particular vulnerabilities, even after they have sought to escape vulnerable circumstances. Thirdly, the proposals imply that savings must be achieved for Northern states to warrant cost transfers to the South, for example, by removing newly-unnecessary asylum systems, as envisioned by Hathaway and Neve.¹⁵⁹ Why a double-benefit (less protection duties *and* savings) should accrue to the North is never made entirely clear. In the end, the proposals are lacking from a justice perspective. They are founded in little more than cost-benefit analysis, with many of the benefits and few actual obligations to accrue to states geopolitically located in the North. Although the Hathaway/Neve proposal highlights ‘common but differentiated responsibilities’ and relies on the notion of boundedness (interest convergence groups) known to foster sharing and just distribution, mostly the proposals aim to prioritise the interests of geo-politically more powerful international actors, not balance responsibilities.

Convention Plus and Beyond

The 50th anniversary of the 1951 Refugee Convention provided the most recent notable impetus supporting discussions about burden-sharing, this time backed by an important international organisation. Between 2000 and 2002, ‘Global Consultations’ were facilitated by UNHCR, presenting an opportunity for various stakeholders to discuss shortfalls and opportunities for improvement in the existing refugee regime. An ‘Agenda for Protection’ emerged from this process, from which eventually materialised the ‘Convention Plus’ initiative.¹⁶⁰ An integral part of the

¹⁵⁹ See also Anker et al, above n 152, 301.

¹⁶⁰ See Alexander Betts and Jean-François Durieux, ‘Convention Plus as a Norm-Setting Exercise’ (2007) 20 *Journal of Refugee Studies* 509, 511 and Erica Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) for an outline of the origins of the initiative.

discussion was how to enhance global commitments, fiscal or otherwise, to burden-sharing,¹⁶¹ especially as concerning *between* North and South. According to UNHCR, Convention Plus was ‘to clarify the apportioning of responsibility and promote a better sharing of responsibilities by states, notably in the context of mass influxes and mixed migratory flows, as well as for durable solutions.’¹⁶²

The process soon focused on the development of overarching normative agreements, which could form the basis of Comprehensive Plans of Action as needed in future.¹⁶³ Agreements were to be developed in relation to three ‘priority challenges’: a) strategic resettlement; b) targeting of development assistance; and c) responsibilities in the event of irregular movement.¹⁶⁴ The goal was that for each of these priorities a ‘special agreement’ was developed ‘between UNHCR and Governments, intended [...] either to be legally binding or to reflect an important degree of political commitment.’¹⁶⁵ Whether agreements turned out ‘hard’ or ‘soft’ was not important, as long as they presented *more than* ‘vague declarations’ or ‘lofty exhortations’.¹⁶⁶

Ultimately, Convention Plus failed to arrive at anything *other than* vague declarations or statements; no new norms emerged and the process may even have fostered geo-political animosity,¹⁶⁷ not helped by the UKs efforts to associate its aforementioned offshore processing proposal with Convention Plus, which raised

¹⁶¹ Betts and Durieux, above n 160, 512.

¹⁶² Office of the United Nations High Commissioner for Refugees, *Convention Plus: Questions and Answers* (2003), 1 <<http://www.unhcr.org/3e4b7c4b4.pdf>>.

¹⁶³ These were envisioned to be similar to the Indo-Chinese CPA discussed above; see Betts and Durieux, above n 160, 512; and for more details Alexander Betts, ‘Comprehensive Plans of Action: Insights from CIREFCA and the Indochinese CPA’ (Working Paper No 20, Office of the United Nations High Commissioner for Refugees, 2006).

¹⁶⁴ Office of the United Nations High Commissioner for Refugees, *Convention Plus at a Glance* (2003), 1 <<http://www.unhcr.org/403b30684.pdf>>.

¹⁶⁵ Office of the United Nations High Commissioner for Refugees, above n 162, 3.

¹⁶⁶ Ruud Lubbers, in Betts and Durieux, above n 160, 514.

¹⁶⁷ See Marjoleine Zieck, ‘Doomed to Fail from the Outset? UNHCR’s Convention Plus Initiative Revisited’ (2009) 21 *Journal of International Refugee Law* 387 and Betts and Durieux, above n 160, 514f.

reservations for many participants.¹⁶⁸ Few new commitments were made to UNHCR and the world's refugees, whilst equity issues in refugee protection remain unaddressed.

This does not mean the issue is off the agenda. Marking the 60th anniversary of the Refugee Convention in 2011, UNHCR-hosted an expert meeting on international cooperation and burden- and responsibility-sharing (in Amman),¹⁶⁹ which although reiterating the sovereign responsibility to protect refugees, noted that collective action and international cooperation are desirable. Acknowledging the failures and limitations of previous burden-sharing models and proposals, the expert group reiterated also that cooperation does not mean simply shifting burdens and responsibilities between states, or the devolving of states' responsibilities to international or other organisations. However, beyond recommending the development of an 'operational toolbox', which 'would provide a set of templates, actions and instruments that may be drawn on to develop cooperative arrangements', no concrete proposals emerged.¹⁷⁰

Final Words

Burden-sharing is an issue which remains of strong interest to both scholars and policy-makers in the displacement context despite the apparent failures or shortcomings of a variety of schemes proposed at least in the refugee context in recent years. The dialogue which has been generated evidences a strong awareness of distributional inequities surrounding global displacee populations, particularly

¹⁶⁸ Betts and Durieux, above n 160, 512, 514.

¹⁶⁹ The details are outlined in Anja Klug and Claire Inder, 'Introductory Note to the Amman Summary Conclusions on International Cooperation to Share Burdens and Responsibilities' (2012) 24 *International Journal of Refugee Law* 468, 470 and Anonymous, 'Expert Meeting on International Cooperation to Share Burdens and Responsibilities' (2012) 24 *International Journal of Refugee Law* 471. The points to follow are outlined in particular in Klug and Inder.

¹⁷⁰ Klug and Inder, above n 169, 470.

refugees. In that sense, burden-sharing is conceptually a worthwhile mechanism to at least contemplate in the climate change displacement context and the distributional issues it raises: not because climate change will necessarily contribute to generating refugees, but because it will further contribute to inequities concerning persons who have been displaced and those who have to respond to this,¹⁷¹ with some geographical locations being impacted more than others (often those whose inhabitants may have contributed little to climate change itself), by displacement and reception. Proposals which exist around inequities concerning global refugee populations evidence a number of limitations, however, which significantly curtail an overly optimistic expectation for the development of burden-sharing in the climate change displacement context: First, burden-sharing *is* overwhelmingly contemplated in relation to refugee populations and not in relation to other types of displacees, which makes it difficult to see a relevant scheme emerging in relation to climate change displacement. Secondly, even where a burden-sharing regime emerges around displacees other than refugees, what will more likely be shared may not be the safeguarding of displacees per se but the financial costs involved in such an endeavour. In other words, there would be little hope of the distribution of displaced persons themselves; only the hope that displacees would benefit through a system (hopefully) 'awash' in money. Otherwise, persons concerned will likely overwhelmingly languish in what are poorer regions of the world but hopefully find themselves better-supported by injections of money into such regions (which does involve a sense of distributive justice; the least well-off are supported in some way). Finally, although the moral obligations to participate in such a scheme may be strong in the climate change context, in particular for many developed countries, this would

¹⁷¹ Several distributional inequities (especially in the spatial sense) were also discussed in the previous chapter.

likely be ill-matched by legal obligations, or, if the past is to be instructive, by political will. Despite such obstacles, burden-sharing has nevertheless been suggested in the climate change displacement context, an issue investigated in greater depth in the following section.

6. Burden-Sharing and Climate Change Displacement

The idea of burden-sharing in the context of climate change and displacement has cropped up periodically, though many proposals lack specificity, or, seemingly, an understanding of the chequered history of burden-sharing in response to displacement. In a 2006 article, Sujatha Byravan and Sudhir Rajan suggest a mechanism by which the displacement burden (actual displacees) would be shared in relation to historic responsibility for emissions.¹⁷² The model proposed would concern only displacees from coastal areas or small islands. In other words, those subject to the ill-effects of sea level rise and with it the possibility of permanent displacement. Considering that a possible one-metre rise in sea levels would generate between 50 and 200 million displacees in total, the authors raise the possibility that historically high-emitting countries would have to partake in hosting responsibilities of such persons: under the authors' model, Italy, the lowest-emitting country considered in the study, would become responsible for hosting at least 8,600 displacees, the United States, the highest emitter, up to 860,000.¹⁷³ The authors argue that such a scheme would be palatable to host nations because of the inherent

¹⁷² Sujatha Byravan and Sudhir Chella Rajan, 'Providing New Homes for Climate Change Exile' (2006) 6 *Climate Change Policy* 247, 251; essentially, this arguably amounts to a hybrid of corrective and distributory approaches.

¹⁷³ *Ibid*, 250.

economic benefits involved in the face of ‘economic crisis’, including the ‘topping up’ of labour markets in the face of greying and shrinking populations.¹⁷⁴

In 2009, Margit Ammer¹⁷⁵ of the Austrian Ludwig Boltzmann Institute of Human Rights pointed to the significant inequities between those who have emitted greenhouse gases and those who will likely be harmed by the effects unleashed by such emissions, including through displacement. Acknowledging that, under international law, there is no binding obligation to alleviate this inequity, she argues that international human rights law, especially concerning economic, social and cultural rights, nevertheless stipulates international responsibilities to facilitate the fulfilment of such rights, including through burden-sharing between wealthier and poorer states, and including through assistance to refugees and displaced.¹⁷⁶ She then points to provisions regarding common but differentiated responsibilities and equity, as contained in the UNFCCC, which provide differentiated allocation of responsibilities, though not, currently, as regarding the consequences of climate change on the individual.¹⁷⁷ She therefore envisions a new *rights-oriented* instrument on climate change displacement, founded in both international human rights and international environmental law, but located under the umbrella of the UNFCCC, which would also contain obligations to share the displacement burden based on the availability of resources in individual states and their contributions to emissions.¹⁷⁸ Ammer argues that the ‘form of burden- and responsibility-sharing in relation to protection obligations could be similar to those that have arisen in the refugee

¹⁷⁴ Ibid, 251.

¹⁷⁵ Margit Ammer, ‘Climate Change and Human Rights: The Status of Climate Refugees in Europe’ (Swiss Initiative to Commemorate the 60th Anniversary of the UDHR, 2009).

¹⁷⁶ Ibid, 71.

¹⁷⁷ Ibid, 71f.

¹⁷⁸ Ibid, 72.

context, e.g. measures regarding the “sharing of persons” (resettlement, temporary protection), sharing of the financial burden [or] sharing of the material burden.’¹⁷⁹

Finally, in 2010 academics Frank Biermann and Ingrid Boas¹⁸⁰ suggested that burden-sharing should be a crucial component also of a UNFCCC Protocol on Recognition, Protection and Resettlement of Climate Refugees. Burden-sharing is the key idea behind the fifth and final principle which would underpin the Protocol: according to the authors, burden-sharing would again be premised on the idea that high-emitting countries have a ‘moral responsibility’ for such persons that are detrimentally affected by climate change. They, too, argue that the principle of common but differentiated responsibilities and capabilities already underpinning the climate regime supports this notion.¹⁸¹ Specific opportunities to share the displacement burden might arise in connection with several of the other principles which would guide the Protocol, namely resettlement (including permanent), as well as ‘international assistance for domestic measures’ taken in response to displacement or its anticipation.¹⁸²

Such proposals have undeniable ethical merit, being based on notions of justice which couple responsibility for risks, costs or burdens arising from climate change with the notion of responsibility for sharing its worst detrimental effects. Whether explicitly acknowledging it or not, such proposals are thus inherently based on distributive justice principles. Sharing based on historical emissions, however, is as problematic here as it was in the discussions regarding compensation presented in Chapter Five. Equally problematic is the suggestion in the Byravan and Rajan

¹⁷⁹ Ibid.

¹⁸⁰ See Frank Biermann and Ingrid Boas, ‘Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees’ (2010) 10 *Global Environmental Politics* 60.

¹⁸¹ Ibid, 76.

¹⁸² Ibid, 75f.

proposal that sharing should occur only around one type of displacement driver – sea level rise – and one type of displacee – the permanently displaced. It is not made entirely clear why sharing should be subject to such limitations. The same proposal also models sharing responsibilities around total displacement figures which have been largely discredited as little more than ‘hype’.¹⁸³ Arguing, finally, that the resettlement of people to historically high-emitting countries would meet with little resistance because it would afford opportunities to top-up labour markets is also not borne out by experience: although there is evidence that previous burden-sharing regimes which incorporated resettlement permitted the cherry-picking of displacees who would also be eligible workers in host nations,¹⁸⁴ this leaves many vulnerable persons excluded and hardly represents a just regime.

Ultimately, burden-sharing proposals in the climate change context are undoubtedly ethically supportable, though they are hardly based on existing international obligations, or ones that are likely to emerge. Although Ammer seemingly argues that the sharing of persons or financial support in the face of displacement is uncontroversial, this is not the case in practice, not even amongst countries as closely linked as the member states of the European Union. Biermann and Boas certainly allude to the difficulties of any sharing regime by acknowledging that the overall scheme they propose would far outweigh any schemes ever known,¹⁸⁵ posing significant challenges to its eventual emergence. Both nevertheless envision the emergence of burden-sharing as part of a treaty regime, which is questionable, however, in light of the many obstacles to a treaty-based approach already discussed in Chapter Three.

¹⁸³ See ch 2 of this thesis.

¹⁸⁴ See Suhrke, above n 11, who describes this in relation to both the post-World War II and Indo-China CPA regimes.

¹⁸⁵ Biermann and Boas, above n 180, 82.

7. Conclusion

Burden-sharing has the appearance of a desirable mechanism to (re)distribute fairly amongst nations some of the costs or burdens associated with climate change and displacement, ensuring that none carries such burdens independently or disproportionately. At the very least, burden-sharing could ensure that some of the consequences of displacement, especially any increase in protection and assistance needs which may arise, are met on a more equitable basis amongst states. International principles concerning cooperation, solidarity and assistance seemingly support this notion; states regularly make at least principled commitments in their support, although opting out is not difficult given the lack of a legally enforceable character of such principles (the common difficulty for obligations founded in distributive justice, as was argued in Chapter Four).

In the displacement context, burden-sharing has, at times, been achieved, either through the actual sharing of persons (e.g. resettlement in the refugee context) (e.g. post-World War II and 1970s Southeast Asia) or the sharing of costs involved in the reception and care of protection seekers (e.g. the European Refugee Fund). Several factors influence the likelihood of sharing: the magnitude and proximity of a displacement event, any pre-existing political, economic or other connectivity between participants in a sharing or potential sharing regime (a pre-existing sense of solidarity or boundedness which merit sharing), the political or economic priorities at the time (leading to cost-benefit analysis) and sometimes humanitarian concern (enlightened self-interest). Where such factors have occurred in ways that have supported burden-sharing in the past, it is conceivable that they may also emerge to play a part in potential burden-sharing in relation to climate change-induced

displacement, whether such sharing takes the shape of sharing the fiscal or sheltering burden.

On the other hand, burden-sharing is implicated in a number of less-than-desirable practices, which support the priorities of those who want to shirk burdens. Thus burden-sharing is mixed up with state practices which are exclusionary (especially where norm sharing is concerned) or which do little to address in full the distributional issues raised by displacement, especially in relation to its spatial distribution. Burden-sharing is thereby used as much to deflect as it is to shelter or support,¹⁸⁶ which bodes less well for conceptualising it as viable in the climate change displacement context. Much will depend on whether burden-sharing in that context is driven by consideration of justice – whether underpinned by a sense of feeling bound in some way to those too heavily burdened (Aristotle's understanding of distributive justice) or operating because of the uncertainty of who will actually be burdened in future (Rawls' construct of the 'veil of ignorance'), which may lead entities to act with enlightened self-interest.

¹⁸⁶ See, eg, Thielemann, above n 114.

CHAPTER 9

Thesis Conclusion

The arc of the moral universe is long but it bends towards justice.¹
(Attributed to Martin Luther King)

1. Introduction

This thesis has provided a justice-based analysis of the role of international law in relation to climate change and human displacement. This chapter concludes by drawing out the broad, cross-cutting themes and findings that have emerged from the analysis. Major insights gained through the application of a justice framework will be identified and situated in the context also of possible limitations of this thesis. The Conclusion will proceed with the following overall structure: It will, first, justify why a justice framework was chosen and what this framework has been able to add to legal consideration of the issue. It will then highlight the major prospects and challenges, first, for corrective justice and, secondly, for distributive justice in relation to displacement in the climate change context, and in relation to international law. A penultimate section will consider avenues for possible further analysis. The chapter will conclude with a few final words about what has motivated this thesis and the overall contribution that it has made.

¹ An aphorism, sometimes attributed to Martin Luther King.

2. Climate Change, Displacement and (In)justice

It is not difficult to support the notion that displacement compelled by climate change raises questions of justice in some shape or form; that its occurrence, though not always certain and the outcome of multiple, and at times complex and interacting factors, is in some ways an injustice. Through the activities of some, detrimental consequences arise for others, including the possibility of human displacement. This thesis has analysed more specifically whether this is an injustice in light of two particular justice paradigms: corrective and distributive justice. It has found that it is possible to conceptualise displacement which may occur in the climate change context as both a matter of corrective and/or distributive (in)justice. In light of the former, displacement was conceptualised to result from harm or losses (of home, livelihoods infrastructure, resources, well-being, etc.), compelled by excessive greenhouse gas emissions induced by human activity. In light of the latter, displacement was conceptualised as presenting an unacceptable burden, distributed unjustly in the spatial and ethical sense, with some individuals, communities or states being burdened excessively, both with displacement or the task to respond to it, whilst others have benefited unjustly from the processes that contribute to its occurrence.

Although justice dimensions may not be difficult to isolate, the literature indicates a hesitation to apply a justice-based framework to thinking about what may be owed in relation to displacement. This hesitation has been driven largely by the apparent complexities involved in the phenomenon. It is true that climate change and its effects will likely not alone (or inevitably) compel displacement. Many interacting factors will play a part, including pre-existing socio-economic, environmental and cultural conditions and vulnerabilities. Nevertheless, human-induced greenhouse gas

emissions and their effects can be conceived of as an important factor, and this thesis has chosen to focus on this aspect and the consequences that should and could arise from it. It has demonstrated that it is not enough to simply agree that displacement in the climate change context may involve injustices, but that thinking about what action should be taken must also be informed by justice considerations.

3. From Injustice to Justice

It is one thing to describe a phenomenon as unjust. This thesis has identified how to conceive of human displacement in the climate change context as a matter of injustice, particularly in light of corrective and distributive justice constructs. However, the main contribution of this thesis has been to analyse how the law (in particular international law) might matter in light of either justice construct, and the role it could therefore play in the realisation of justice. Amartya Sen, whose ‘capabilities’ approach to justice was introduced in earlier chapters, emphasises the importance of this point in his book, *The Idea of Justice*, where he argues that ‘beyond theory, there must be a ‘focus on actual realisations and accomplishments’ in relation to justice; in other words, on ‘realised justice’, or a justice which is practically relevant.’² This thesis has taken this approach by applying the theoretical constructs of corrective and distributive justice to the possibilities they raise in relation to displacement in the climate change context through the application of the law, and in particular, international law.

² Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009) 10.

4. Justice, International Law, Climate Change and Displacement

Justice in International Law – The Gentle Civilizer?

This thesis has shown how international law scholarship displays a keen interest in the identification of the extent to which ‘justice’ (and other normative concepts), in theory and practice, is relevant to the discipline. Some scholars of international law (especially those who fall within the New Approaches to International Law (NAIL) tradition) have evidenced a disciplinary dialogue which veers, in bipolar fashion, between ‘apology’ and ‘utopia’, between support for the notion of states’ pursuit of self-interest and the ability of international law to act also as a ‘gentle civilizer’³ of sorts, a moderator in favour of justice, for example. Others doubt that justice underpins international law (and relations) but have proposed various means by which the international legal order could be re-oriented towards fostering justice better. However, the thesis also noted that ‘justice’ here often means something conceptually vague. Little attention is usually paid to considering or applying particularised ‘conceptions’ of justice⁴ to international law, or a phenomenon with which it is concerned. This thesis chose to pursue such an approach. It has taken the particular ‘conceptions’ of distributive and corrective justice and has applied them to analysis of the role of international law in relation to displacement in the climate change context. The thesis contends that through the application of this framework a novel way of looking at the relevance and possibilities of the law in relation to the phenomenon emerges.

But why corrective and distributive justice? Many would argue that justice paradigms are not limited to these two. Chapter Four outlined in some detail the

³ See Martii Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press, 2001).

⁴ See Tom Campbell, *Justice* (Palgrave Macmillan, 3rd ed, 2010) 13. The author distinguishes between particular ‘conceptions’ of justice and the overall ‘concept’ of justice.

Aristotelian origin of the corrective and distributive justice dichotomy and how it has permeated thinking about justice for centuries. More importantly, the chapter argued that the corrective and distributive justice dichotomy provides a comprehensive, yet targeted way of ‘ordering external relationships’; according to Ernest Weinrib it essentialises them to ‘mutually irreducible forms’.⁵ The Chapter also showed how, beyond being theoretical constructs, the two types of justice can be and are reflected in the law, perhaps more notably so in the case of corrective justice, given its strong affinity with tort law. This thesis has shown how the two constructs may also be reflected in international law (and relations), and the demands this may therefore raise in relation to particular phenomena, including displacement in the climate change context. The following two sections will crystallise the findings which emerged in relations to each justice paradigm.

Corrective Justice – Possibilities and Challenges

Two thesis chapters (Five and Six) concerning corrective justice exploited a corrective justice distinction outlined in some detail in the theory chapter (Four), namely that corrective justice has been conceptualised as both ‘pure’ and ‘rough’. In its ‘pure’ form, as argued by Weinrib (who leans on Aristotle), what matters is a ‘[c]orrective justice [which] treats the defendant’s unjust gain as correlative to the plaintiff’s unjust loss. The disturbance of the equality connects two, and only two, [parties].’⁶ This means that both a loss bearer *and* a particular perpetrator (or several, as long as they collectively, but specifically caused the harm) of loss, harm or damage must be identified. This was the goal of Chapter Five, which attempted, first, to isolate loss bearers in the climate change displacement context and, secondly, to

⁵ Ernest J Weinrib, ‘Corrective Justice’ (1992) 77 *Iowa Law Review* 403, 416.

⁶ *Ibid*, 410

isolate a particular perpetrator whose actions compelled the loss bearers' harm, loss or damage. Several challenges were identified in relation to the latter. In particular, many entities contribute to climate change through greenhouse gas emissions, and therefore its ill effects, but no particular emissions are specifically harmful by themselves. Displacement is also rarely ever the result of just one factor or easily determined casual chains, etc.

Chapter Five also considered other important corrective justice-related matters: namely, whether the re-instatement of a prior state of affairs, so important in corrective justice, is possible in relation to displacement. The chapter argued that if compensation is implemented thoughtfully this may indeed be the case. The chapter, finally, investigated the extent to which corrective justice is a feature of international law. It showed that corrective justice features in international law but in ways that are severely curtailed: essentially, corrective justice only applies in instances where an international obligation has been breached by a state, so that obligation would have had to be engaged in the first place. In, other words, it may be possible to hold a particular entity (a state) responsible, but only in relation to a limited array of wrongs, those that arise in relation to the consequences of an 'illegal act'. The chapter sought to present opportunities under international law for obligations (and their breaches) which would be relevant to the climate change harm context, and to climate change and displacement more specifically, concluding that this, too, provides challenges. Ultimately, the chapter determined that a 'pure' corrective justice-based claim would be difficult to establish under international law. Causal, legal and other hurdles may simply be too significant for the present time. Chapter Five also concluded that this, however, cannot mean that those affected by climate

change's ill effects, including displacement, have no opportunities to seek redress, no opportunities to seek corrective justice.

In Chapter Six, the thesis therefore turned to exploiting an alternative conceptualisation of corrective justice, as proposed, for example, by scholar Jules Coleman, who has questioned why responsibility for correcting harm, loss or damage must be imposed 'on *particular* injurers'.⁷ The role of 'rough' corrective justice, which does not emphasise particular duty bearers, was therefore explored. The thesis argued that 'rough' corrective justice may be able to overcome some of the causal hurdles which challenge a possible claim under 'pure' corrective justice. Namely, with a focus on a particular duty bearer gone, particularised fault no longer matters either, and opportunities to affect loss recovery under no-fault mechanisms arise. The chapter explored, specifically, the role of insurance as no-fault compensation, including support for such a mechanism under international law and its relevance to the climate change displacement context. The chapter concluded that 'rough' corrective justice, implemented through insurance, would overcome important causal hurdles raised in the climate change context and implement a more efficient and fair compensatory system, one that is also highly relevant in the displacement context.

Distributive Justice – Possibilities and Challenges

The thesis acknowledged that the notion of compensation, and therefore of corrective justice, remains politically sensitive, if not altogether unpalatable, and legally challenging in the climate change context. It highlighted the significant resistance, certainly, to the potentially emerging loss and damages mechanism within the the international climate change negotiations, and the possibility of compensation for

⁷ Jules Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 *Indiana Law Journal* 349, 352 [italics added by thesis author].

loss, harm or damage which it raises (Chapter Six). The thesis therefore also explored a different justice construct in relation to climate change, displacement and to international law. Later chapters of the thesis took the construct of distributive justice and applied it to questions of justice and of responsibilities in the climate change and displacement context.

Chapters Seven and Eight explored two possible distributive injustices raised by displacement in the climate change context, and the consequences which should arise from this: first, Chapter Seven explored the injustice that those who may face displacement are distributed unevenly, with some places, often those who have contributed little to greenhouse gas emissions, expected to be impacted more significantly. The chapter argued that the international climate change regime accepts that distributive injustices arise in relation to climate change and that those most burdened should be assisted by those least burdened and most responsible for greenhouse gas emissions as a matter of distributive justice. The chapter also related this understanding back to the distributive justice theories of both John Rawls and Amartya Sen, which were introduced in detail in Chapter Four. Importantly, Chapter Seven argued that the distributive justice foundations of the international climate change regime may be of fundamental importance to resolving the distributive injustices involved in displacement in the climate change context for those affected, as displacement (and other human mobility-related matters) has found some expression in the international assistance framework being set up under the climate change regime. However, Chapter Seven also concluded that although fundamental commitments to relieving the plight of those burdened disproportionately (the least well-off, to put it in Rawls' terms) by the impacts of climate change have been made, the realisation of distributive justice via the international climate change regime is

hampered by a lack of concrete obligations to contribute (financially and otherwise) to that regime. Distributive justice in the context of climate change and displacement is therefore doubtful if it is to arise in connection with the international climate change regime.

The problem just mentioned – between theoretical and actual commitments made – is one that plagues distributive justice. Chapter Four, in particular, highlighted how distributive justice may support weaker obligations or duties, as it is not about the re-instatement of a prior right, one that an entity held in the first place.⁸ In practice, this often means that distributive justice is resolved through no more than voluntary commitments made by implicated duty bearers, a fact that also plays out in the context of climate change, where distributive injustices are widely acknowledged, as are responsibilities which should arise from this, but commitments to actually resolving such injustices are often lacking.

Chapter Eight, finally, explored distributive injustices which arise in connection with receiving, sheltering or assisting displacees. The chapter argued that this burden will likely be distributed inequitably amongst states but sought to investigate whether the concept of international burden-sharing might provide a basis by which to think about distributive justice in this context. The chapter outlined the connection between burden-sharing and distributive justice, arguing that both Rawls' concept of the 'veil of ignorance', which makes actors pursue equity in light of prevailing uncertainties, and Aristotle's notion of distributive justice amongst deserving, bounded actors are important. The chapter also identified burden-sharing, as well as related concepts such as solidarity and cooperation, as goals of international law. The chapter investigated international legal commitments to burden-sharing and how it

⁸ See also Izhak Engard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford University Press, 2009) 35.

has panned out in relation to a number of prominent displacement scenarios. Ultimately, the chapter concluded that burden-sharing is both promising and doubtful in the climate change and displacement context, not least because it usually is practiced (or contemplated) only in relation to one type of displacee – refugees – and in the context of their mass arrival. International burden-sharing has the potential to address distributive injustices related to climate change and displacement – certainly those faced by certain states – but whether it will, in practice, emerge as a distributive mechanism is not certain.

Final Words

This thesis has offered another way of asking questions about, and understanding the role of, international law in relation to climate change and displacement. Applying a justice framework has meant that questions of responsibilities which arise in connection with undeserved burdens or harms have permeated the analysis where they have not usually done so before. The justice approach has helped to ensure that questions are asked of the law that are not only integral to the positive law's inherent principles and opportunities, but which have broader relevance. On the other hand, keeping the analysis relatively close to the law has helped this thesis to avoid the trappings of an analysis focused 'only' on justice, which could easily have become unbound and possibly overly idealistic. The significant contribution of this thesis is thus not that it has derived a single, yet-uncovered legal resolution to the phenomenon that lies at the heart of its investigation, but that a unique lens has provided valuable insights about the relevance of the law. This approach has not so much been about being close to the possibilities of the law but the responsibilities

towards those affected by a great injustice and the legal consequences which could and should arise from this.

5. Future Research and Analysis

There are a number of inter-related areas of inquiry which this thesis has not pursued but which warrant significant further attention. Three, in particular, deserve some mention: First, despite the fact that this thesis is not focused exclusively on theory, it has nevertheless been strongly bound by theory (and in particular Western philosophical tradition). What this means is that it has paid relatively little attention to what justice might, in practice, mean to those who may be affected by displacement. Realising justice, ultimately, will also require the engagement of those who experience or fear the claimed injustice, or are likely to be beneficiaries of the achievement of justice. What might justice look like to them – in theory and/or practice – and in their own words? The scope of this thesis has meant that this dimension was not incorporated in the research, but the author recognises that it deserves attention. A second issue that has not been resolved through this research, and which is related to the first issue, is the relevance of participatory justice in realising both corrective and distributive justice through international law in relation to climate change and displacement. A lot of emphasis in the thesis has been on states being the parties in the rendering and receiving of what is due. But of course, receiving what is due at that level may not necessarily translate into justice for individuals who are affected. Not all states may be inclined to achieve what would amount to a just outcome for impacted persons. Others might be so inclined but might struggle to get their views and priorities acknowledged or implemented.

Questions concerning participatory justice, including how it relates to international law, therefore deserve a much more significant amount of attention than has been possible in this thesis. Finally, participatory justice is not the only additional justice construct which may deserve attention in relation to the thesis topic. Although this thesis has contended that the corrective/distributive justice dichotomy provides an essential and comprehensive justice paradigm, and most other justice constructions likely fit under its umbrella, many other justice theories potentially deserve contemplation. Given the scope of a doctoral dissertation, it has not been possible to consider them all. One final note is that justice theory provides one way of asking about responsibilities and the consequences of certain actions and interactions. Questions of responsibility, which undoubtedly deserve to be asked in relation to anthropogenic climate change, and in particular in relation to its detrimental consequences, may also, however, be approached from within frameworks other than justice.

6. Final Words

Like many of those who write about the possibility of displacement in the climate change context, the writer of this thesis was motivated to engage with the issue because of the grave justice concerns that it undoubtedly raises. With the advent of anthropogenic climate change, many may find their livelihoods or sense of well-being affected negatively by the often detrimental effects of a phenomenon which they neither created nor desired. This seems monumentally unfair, in particular when considering that the benefits which *have* accrued from the processes that lead to

anthropogenic climate change may be enjoyed elsewhere. Like others who write about displacement in the climate change context, or advocate around it, this thesis was motivated by a sense of outrage – a sense that ‘something must surely be done’ in response to an issue which is emerging, at least in part, because humanity’s (or at least a section of it) appetite for burning fossil fuels is seemingly unbridled and difficult to control. Where this thesis has hopefully made a worthwhile contribution is by demonstrating that it is important to not only understand and demarcate the issue itself as one infused with justice dimensions. Rather, the thesis has argued that justice considerations must play a pivotal role concerning its resolution. What justice ‘thinking’ can undoubtedly add here is that any attempt at resolution must include asking questions concerning responsibility – and the consequences, including legally, which should arise when displacement is viewed in such a light.

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